No. 11,514

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL CHEMICAL WORKERS UNION, A. F. L., et al.,
Intervenors,

and

WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO),
Intervenor,

and

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

COLGATE-PALMOLIVE-PEET COMPANY,
Respondent.

BRIEF FOR PETITIONER, COLGATE-PALMOLIVE-PEET COMPANY.

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STATEMENT OF JURISDICTION.

The Petitioner herein, is Colgate-Palmolive-Peet Company, a corporation (hereinafter called Petitioner).

This matter comes before this Court on Petitioner's petition for review (R. 101-126) of a decision of the National Labor Relations Board (R. 68-85) (hereinafter called the Board) in a complaint case filed by the Board against the Petitioner. The complaint (R. 4-10) was based on charges of unfair labor practices brought by International Chemical Workers Union, A.F.L., plaintiff in intervention herein (hereinafter called AFL). Three charges were preferred by the A.F.L. The first charge was filed on August 14, 1945 (R. 92-93); the second or first amended charge was filed on October 4, 1945 (R. 89-92); and the third or second amended charge was filed January 18, 1946. (R. 1-4.)

Opinion below.

The opinion, decision and order of the Board is reported in 70 N.L.R.B. 1202, and entitled therein "In the Matter of Colgate-Palmolive-Peet Company and International Chemical Workers Union, A. F. of L." (Case No. 20-C-1937; R. 68-85).

Jurisdiction.

The petition herein was filed on December 30, 1946. At that time the National Labor Relations Act (hereinafter sometimes referred to as the Wagner Act), 29 U.S.C.A., Sec. 160(f), then in effect, conferred jurisdiction upon this Court to review orders and decisions

of the Board, and provided the procedure therefor. The Labor Management Relations Act, 1947 (hereinafter sometimes referred to as the new Act or the Taft-Hartley Act), 29 U.S.C.A., Sec. 160(f), now in effect, likewise confers jurisdiction upon this Court to review such orders and also provides the procedure therefor.

STATEMENT OF THE CASE.

This is a petition for review (R. 101) of a decision and order (R. 68) of the Board dated September 6, 1946. In this decision the Board found that the Petitioner had discharged and refused to reinstate thirty-seven of its employees because of their activities on behalf of the AFL and against International Longshoremen's & Warehousemen's Union No. 6, CIO (hereinafter called CIO) in violation of Section 8(1)(3) of the National Labor Relations Act of 1935[1] (29 U.S.C.A., Sec. 158(1)(3); R. 79). It is *important* to note in connection with this finding that the Board also found or concluded that:

1. At the time this case arose there was a valid contract, entered into and executed in compliance with the terms and conditions of the proviso to Section (8)(3)[2] of the National Labor Relations Act, between the Petitioner and the CIO, which required

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[1]Substantial changes in and additions to Section 8 of National Labor Relations Act have been effected by the enactment of the Labor Management Relations Act, 1947.

[2]The text of Section 8 of the National Labor Relations Act is set forth at pages 6-7, infra.

as a condition of employment membership in the CIO (R. 69).

2. At the time this case arose a question concerning the representation of Petitioner's employees was pending. (R. 75.)

3. The employees involved were suspended from membership by the CIO, and were discharged by the Petitioner at the request of the CIO under the terms of the contract. (R. 70; 71; 74-75.)

4. Twenty-eight of the employees involved had participated, prior to their discharge, in a strike. (R. 70; 72.) (The Board in its decision fails to note or mention the admitted fact that this strike was not sanctioned by the CIO (R. 258), and was contrary to and in violation of the CIO policy and pledge not to engage in strikes during the course of the war (R. 420-421; 506-507), and that the nine other employees involved all had a part in fomenting this strike. (R. 202-203; 274; 296; 366-367; 404-407; 420-421).)

5. All of the employees involved, prior to their discharge, engaged in activities intended to displace the CIO as the bargaining representative of Petitioner's employees and to substitute in its stead the AFL. (R. 70-72.)

6. All the employees involved, prior to their discharge, advised the Petitioner and the CIO that they had withdrawn from the CIO.

7. The CIO, after trial expelled[3] all the employees involved, "principally for their anti-CIO conduct in 'undermining union policies.'" (R. 75.) (In this finding the Board is referring to two decisions of trial committees of the CIO which are evidence as Intervenor's Exhibits Nos. 6 and 7. (R. 856; 867.) These show that five employees, who had been CIO stewards were found guilty of failing to enforce the CIO policy against racial discrimination (R. 862), and of failing to perform other duties of their office (R. 863; 864); that four of the employees were found guilty of fomenting the war-time strike, and of defaming an officer of the CIO (R. 865); and that twenty-seven employees were found guilty of participating in or fomenting a war-time strike. (R. 873).)

8. The CIO, although it expelled and suspended the employees for "undermining union policies", as set forth in 6 above, in so doing *was motivated solely by its desire to punish them for their activities against it and on behalf of the AFL.* (R. 76.)

9. Although the Petitioner knew of several valid reasons, including the activities described in 5 and 6 above, on which the CIO could have justified the expulsion and suspension of the employees, it also *knew,* when it discharged the employees, that the CIO in so

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[3]The Board is in error in finding that all the employees were expelled. The record makes it clear that at least fifteen of the persons involved pleaded guilty, before a trial committee of the CIO, to the charge of participating in a wartime strike in violation of the CIO policy and pledge, and were placed on probation, not expelled. (R. 506-507; 328-329.)

suspending and expelling them *was motivated solely by its desire to punish them for their activities against it and on behalf of the AFL,* and Petitioner, therefore, violated Section 8(1)(3) of the National Labor Relations Act. (R. 76.)

10. The Petitioner made no *bona fide* effort to evaluate the evidence before it, otherwise it would have drawn therefrom the same inferences and deductions as did the Board, and would have inevitably concluded that the CIO in requesting the discharges was acting in reprisal against the employees because of their anti-CIO activity (R. 78; 79).

On the basis of the foregoing findings, the Board ordered the Petitioner to:

Cease and desist from discouraging membership in the AFL, or encouraging membership in the CIO by discharging or refusing to reinstate any of its employees (R. 80).

Offer to the discharged employees immediate and full reinstatement (R. 81).

Make whole the discharged employees for any loss of pay suffered by them by reason of Petitioner's alleged discrimination (R. 81).

Section 8(1)(3) of the National Labor Relations Act, allegedly violated by Petitioner, provided as follows:

> *"Section 158.*[4] *Unfair Labor Practices by Employer Defined.*

[4]Section 8 of National Labor Relations Act.

It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157[5] of this title.

* * * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided, That nothin sections 151-166*[6] *of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted, by any action defined in sections 151-166*[7] *of this title as an unfair labor practice) to require as a condition of employment memberships therein, if such labor organization is the representative of the employees as provided in Section 159(a)*[8] *of this title, in the appropriate bargaining unit covered by such agreement when made."* (Italics ours.)

29 *U.S.C.A.*, Section 158(1)(3.)

Section 7 of the National Labor Relations Act mentioned in Section 8(1) above read as follows:

"Section 157. Right of Employees as to Organization, Collective Bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations,

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[5]Section 7 of National Labor Relations Act.
[6]Sections 1 to 16 of National Labor Relations Act.
[7]Sections 1 to 16 of National Labor Relations Act.
[8]Section 9(a) of National Labor Relations Act.

> to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."
>
> 29 *U.S.C.A.*, Section 159[9].

In view of the express language of the statute allegedly violated and of the facts and circumstances involved, this decision of the Board raises the following questions:

(a) Whether the Board usurped the powers and functions of Congress by adding, through alleged construction, the following qualification to the proviso to Section 8(3):

> "No employer shall justify any discrimination against an employee for non-membership in a labor organization * * * if he has reasonable grounds for believing that membership was * * * terminated because of activity to secure a determination pursuant to Section 9 * * *, at a time when a question concerning representation may appropriately be raised."[10]

(b) Whether the Board, by nullifying the "closed shop" contract and interfering in the internal affairs of a Union, usurped the powers and functions of Congress by adding, through alleged construction, the following specification of unfair labor practices to Section 8:

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[9]Section 7 of National Labor Relations Act.

[10]Based on "Federal Labor Relations Bill of 1947" (S. 1126), as passed by the Senate (deleted in conference). See Special Supplement to Teller, "The Law Governing Labor Disputes and Collective Bargaining", pp. 71, 72, and "The New Labor Law" (The Bureau of National Affairs), p. C-20.

"It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce * * * employees in the exercise of the rights guaranteed in Section 7: * * *;

(2) to persuade or attempt to persuade an employer to discriminate against an employee with respect to whom membership in such organization has been * * * terminated * * * because he engaged in activity designed to secure a determination pursuant to Section 9 * * * at a time when a question concerning representation may be appropriately raised."[11]

(c) If in answering (b) above, it is held that the Board did not have the power to penalize the CIO, directly or indirectly, for alleged unfair labor practices, whether the Board could require the vicarious expiation of the wrongdoing, if any, of the CIO through punishment visited upon the Petitioner.

(d) If it is held that the Board has properly construed Section 8, and has not usurped the powers and functions of Congress, whether the CIO's alleged unfair or malicious motivation deprives it of the legal right to discipline its members *because* of a plain and clear violation of its policy and pledge against wartime strikes.

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[11]Based on "Federal Labor Relations Bill of 1947" (S. 1126) as passed by the Senate. Subsection (1) was modified and expanded in the New Act; subsection (2) was deleted in conference. See Special Supplement to Teller, "The Law Governing Labor Disputes and Collective Bargaining", p. 72 and "The New Labor Law (Bureau of National Affairs) p. C-21.

(e) If it is held that the Board has properly construed Section 8 and has not usurped the powers and functions of Congress, whether the Petitioner had the legal right and obligation to refuse to perform the admittedly valid "closed shop" provision of the agreement, if it knew that the CIO in exercising the legal right to discipline its members *because* of a plain and clear policy of its rules was motivated by malice and ill-will against those who sought to displace it as the representative of petitioner's employees.

(f) If it is held that the Board has properly construed Section 8, and has not usurped the powers and functions of Congress, whether members of a Union may immunize themselves against discipline *because* of a plain and clear violation of a Union's rules by manifesting their hostility to it.

(g) If it is held that the Board has properly construed Section 8, and has not usurped the powers and functions of Congress, whether the Board sustained the burden of proving that Petitioner knew that the CIO had disciplined its members *because* of their anti-CIO activity, and *not because* of their plain and clear violation of the CIO's policies against wartime strikes, racial discrimination, etc.

(h) If it is held that the Board has properly construed Section 8, and has not usurped the powers and functions of Congress, whether the Board sustained the burden of proving that the Petitioner made no bona fide effort to evaluate the evidence before it by showing that petitioner did not draw therefrom the

same inferences and deductions as the Board, and did not conclude, as did the Board, that the CIO in requesting the discharges was acting in reprisal against the employees because of their anti-CIO activity.

In the event that the construction which the Board placed on Section 8(1)(3) is held invalid as an usurpation of the powers and functions of Congress, these other questions are also raised.

(i) Whether the Board by nullifying the "closed shop" contract deprives the petitioner and CIO of property without due process.

(j) Whether the Board in ordering Petitioner to make whole the discharged employees for loss of pay deprives the Petitioner of property without due process.

Some of the questions above outlined were first raised in the pleadings filed by the Board and the Petitioner.

Board's complaint.

The Board's complaint[12] (R. 4-10) in Paragraph V thereof, charged that the Petitioner interfered with the rights guaranteed the employees in Section 7 of the National Labor Relations Act by discharging and threatening to discharge employees because of their membership in and activity in behalf of the AFL, or their failure or refusal to join or assist the CIO. (R. 6-7.)

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[12]Only the allegations supported by the Board's decision are set forth.

In Paragraph VI of the complaint the Board charged that Petitioner had discharged Clyde Haynes, David Luchsinger, Frank Marshall, Sanford Moreau, Harry Smith, Edwin Thompson, Harold Lonnberg, Lincoln Olsen and William Sherman because of their activity in forming "Colgate-Palmolive-Peet Company Employees' Welfare Association" (hereinafter called the Welfare Association), and their attempts to substitute the Welfare Association for the CIO as the bargaining representative of the employees, and had subsequent to the discharge above mentioned refused to re-employ them because of their said activities, and because of their membership in and activity on behalf of the AFL. Said paragraph also charged that the Petitioner had discharged twenty-eight other employees because of their membership in and activity on behalf of the AFL and the Welfare Association. (R. 7-8.)

In Paragraph VII of the complaint it was alleged as a conclusion that the charges set forth in Paragraph VI constituted discrimination in regard to hire and tenure of employment of the individuals discharged, and was intended to discourage membership in the AFL and the Welfare Association and to encourage membership in the CIO (R. 8-9.)

Petitioner's answer.

In its answer (R. 10-16) the Petitioner sets forth the "closed shop" provision of the contract pursuant to which it acted, and which the Board seeks to set aside and nullify. The Petitioner has also averred in

its answer the facts concerning the discharged employees' participation in the strike, and the action taken against them by the CIO because of this activity.

The pertinent and material portions of Petitioner's answer are as follows:

> "5. Further answering said paragraph VI, respondent avers as follows:
>
> (1) At all times mentioned in said complaint and since the 9th day of July, 1941, there has been and there is now in existence a valid collective bargaining agreement entered into by and between respondent and said" CIO. "Section 3 of said collective bargaining agreement provides as follows:
>
> 'Section 3. The Employer agrees that when new employees are to be hired to do any work covered by Section One (1), they shall be hired through the offices of the Union, provided that the Union shall be able to furnish competent workers, for work required. In the event the Union is unable to furnish competent workers, the Employer may hire from outside sources, provided that employees so hired shall make application for membership in the Union within fifteen (15) days of their employment. *The employees covered by this agreement shall be members in good standing of the Union and the Employer shall employ no workers other than members of the Union* subject to conditions hereinabove prescribed. In the hiring of new help for the warehouses, they shall be hired through the offices of the' CIO. (Italics ours.)

"(2) At various times between July 30, 1945, and September 13, 1945, respondent has received communications from said" CIO "advising it that the persons named in said paragraph VI of said complaint had been suspended from membership in the" CIO "and were no longer members in good standing in said" CIO "and requesting that pending the determination of charges filed against said persons, said persons should be removed from respondent's employ. *Respondent was advised by counsel that it had no alternative under the provisions of said section 3 of said collective bargaining agreement but to remove said persons from its employ* and pursuant to said advice it did remove said persons from its employ on dates set forth in said Paragraph VI of said complaint. (Italics ours.)

6. Further answering said Paragraph VI, respondent avers that it did not remove or discharge Clyde W. Haynes, David Luchsinger, Frank Marshall, Sanford Moreau, Harry A. Smith, Edwin Thompson, Harold Lonnberg, Lincoln Olsen and William Sherman because of their activity in forming the association, their attempts to substitute the association for the" CIO "as bargaining representative of respondent's employees and/or because of their collective activity on behalf of respondent's employees. In this connection, respondent avers that said persons above named were removed from respondent's employ at the instance and request of the" CIO "because they were no longer members in good standing of said" CIO.

"Further answering said Paragraph VI, this respondent avers that it has not refused nor does

it now refuse to reemploy any of the persons named in said paragraph VI of said complaint because of their membership in and activity on behalf of the" AFL, "and in this connection respondent avers that because of its contractual obligations as herein set forth, it cannot reemploy said persons until such time as they again become members in good standing of said" CIO "and that respondent's refusal to reemploy them is based on the fact that said persons are not members in good standing of said" CIO.

"7. Further answering said paragraph VI, respondent is informed and believes and on said information and belief avers that Calixto Rigo, Robert Ashworth, Thomas Azevedo, Manuel Munoz, Nick Tate, Glen Hixson, Vincent Barboni, Martin Heppeler, Alden Lee, Felix Denkowski, Manuel Souza, Albert Zulaica, Ann Cerrato, Ina Mae Paige, Caetano Perreira, Rose Ros, and John Perucca, were charged by said" CIO "with violating the constitution of said" CIO "and policy of said" CIO "as adopted by majority vote of its membership and more specifically with participating in a three-day work stoppage during the war, in violation of said" CIO's "wartime no-strike pledge, and in this connection, respondent is also informed and believes and on said information and belief avers that all of said persons above named pleaded guilty to the charge and are now on probation for one year and have been given permission to work out of the" CIO's "hiring hall and be employed in other concerns having contracts with said" CIO "and that said persons are not during said period of probation members in good standing of said" CIO.

"Further answering said paragraph VI, respondent is informed and believes that Sebastian Ramirez, Terry Anderson, Henry Hellbaum, Henry Gianarelli, Ophelia Reyes, William C. Howard, Kay Norris, Genevieve Young, Frank Richmond and Manuel Allegre were also charged with the offense above specified but refused to stand trial and were expelled from said" CIO "and are not now members of said" CIO. (R. 12-15.)

Proceedings before the Board's Trial Examiner.

After the filing of Petitioner's answer, a hearing was held on the matter from February 4 to 8, 1946, at San Francisco, California, before Horace A. Ruckel, Esq., Trial Examiner duly appointed by the Board's Chief Trial Examiner. (R. 21; 164.)

At the opening of the hearing, the CIO made a motion to intervene, based on its interest in the contract here in question, and the motion was granted by the Trial Examiner. (R. 21; 168-176.) At the conclusion of the Board's case, the Petitioner made a motion, in which it was joined by the CIO, to dismiss the complaint. The Trial Examiner denied the motion, except as to certain allegations of the complaint, which alleged that the Petitioner removed notices of the AFL from its bulletin boards, that it kept AFL meetings under surveillance, and that it discriminatorily discharged Rose Gilbert. In these respects, the motion was granted. (R. 21.)

At the conclusion of the hearing, Petitioner renewed its motion to dismiss the complaint and at that

time the Trial Examiner reserved ruling thereon. (R. 21; 782; 783.)

Trial Examiner's decision in favor of Petitioner.

Thereafter, the Trial Examiner, in effect, granted Petitioner's motion to dismiss the complaint, when he determined in his intermediate report that Petitioner had not violated the National Labor Relations Act, and recommended to the Board that the complaint be dismissed. (R. 66-67.)

The Trial Examiner exhaustively reviewed the evidence submitted to him and determined that although Petitioner learned during the course of events herein involved that many of its employees were dissatisfied with the CIO, and that the CIO may have been motivated in securing their discharge by a desire to eliminate the opposition, it also knew of other acts done by the employees which afforded the CIO valid grounds and good cause for terminating their membership. The Trial Examiner, therefore, concluded, that the Petitioner was not called upon, at its peril, to assume the role of a judge for the purpose of determining whether the CIO's motivation was lawful or unlawful, and that upon the whole record it could not be found that Petitioner knew that the CIO had requested the discharge of the employees because of their activities on behalf of the AFL and against the CIO. In so finding and in so concluding, the Trial Examiner stated:

> *"That the contracting union might properly discipline members for participating in a strike*

called in violation of union policy, by suspending or expelling them, seems to the undersigned hardly open to question. A labor organization, no less than any other organization, cannot be denied the authority to compel compliance with the decisions of its membership. 'Good standing' in an organization implies something more than the mere payment of dues.

"It is sometimes difficult to determine where permissible activity on behalf of a rival organization carries over into such overt acts of sabotage or obstruction directed against the contracting union, as seriously to impair the labor government in the plant and to invoke the union's discipline. It is for this reason, perhaps, that unions ordinarily seek to proscribe any activity on behalf of another labor organization, and to stigmatize it as 'dual unionism.' When this attempted proscription during an appropriate period, however, enlists the knowing cooperation of the employer, with the consequence that the offending member is discharged and deprived of his livelihood, the Board has not hesitated to find a violation of the Act. In each such instance, however, the Board has required knowledge by the employer, derived from information in its possession at the time it effectuated the discharge. *This information has heretofore been of such a nature as not to require any interpretation of evidence, or any independent investigation on its part.*

"The reasons for this seem clear. Any effective investigation which the employer might undertake would almost necessarily involve it in the internal affairs of the Union, and expose the re-

spondent to a charge of interference, restraint, and coercion in violation of the Act. In the instant case, for the respondent to determine to what extent participation in the strike of July 31, and the non-payment of dues, contributed to the suspension of the employees involved, and to what extent their acivity on behalf of the A. F. of L. was a factor, the respondent would probably have had to question officers of the C.I.O. and to have had access to the minutes and records of the meeting or meetings at which the Union's decision to suspend them was made. Even then the respondent could hardly have escaped assuming the role of a judge. Such access to the records of a union, is, in effect, barred to him by the operation of the Act. In any event, he has no means of compelling it." (Italics ours.) (R. 63-65; 70 N.L.R.B. 1202 supra, at pp. 1229-1230.)

Board's decision overruling Trial Examiner.

The Board overruled the findings of its Trial Examiner, and found, as stated before, that Petitioner had violated the National Labor Relations Act. The reasoning of the Board in so finding is epitomized in the following quotation taken from its decision:

> "The respondent's position, as revealed in its brief to the Trial Examiner, is that the *Rutland Court* and *Portland Lumber* cases are wrong; that it is for the Congress and not the Board to prevent employers from performing closed-shop contracts made pursuant to the express language of the proviso to Section 8(3) of the Act, if it appears desirable to prevent abuse of such contracts; and that in any event it would be 'unjust' to require the respondent to determine whether

> the C.I.O.'s asserted motivation was 'merely ostensible and not real,' on the ground that the respondent could not 'necessarily have deduced' the C.I.O.'s true motive. We find no merit in these contentions. We are satisfied, particularly in view of the C.I.O.'s widespread and open campaign among the employees during the preelection period and the respondent's knowledge thereof, that the respondent made no *bona fide* effort to evaluate all the evidence before it when it allegedly decided, despite the C.I.O.'s failure to deny the obvious facts, to believe that the C.I.O. was not acting in reprisal against the complainants before their anti-C.I.O. activity." (R. 78, 79; 70 N.L.R.B. 1202, supra, at p. 1208.)

From the foregoing, it is evident that three basic errors permeate the whole of the Board's decision:

(a) That the Board had power under the National Labor Relations Act to prevent the coercion of employees by other employees or labor organizations.

(b) That an act though lawful in itself is converted by a malicious and bad motive into an unlawful act.

(c) That the obligor, in a lawful contract, performs the terms thereof at his peril unless he ascertains the true state of mind of the obligee.

Proceedings had after the decision of the Board.

After the issuance of the decision and order of the Board, Petitioner filed a motion to reconsider, and

this was denied by the Board on November 6, 1946. (R. 85.)

Thereafter, on December 30, 1946, Petitioner filed its petition for review. (R. 101-126.)

On February 3, 1947, the Board filed its answer to said petition, and its request for the enforcement of its order. (R. 134-143.)

On February 17, 1946, this Court made and entered its ex parte order permitting the CIO, the AFL and the discharged employees to intervene in the proceeding. (R. 143-144.)

Pursuant to this order, the CIO, the AFL and the discharged employees have filed their complaints in intervention herein. (R. 144-150; 151-156.)

The complaint of the AFL and the discharged employees prays for the enforcement of the Board's order.

On March 1, 1947, Petitioner filed its answer to the complaint in intervention of the AFL and the discharged employees. (R. 156-163.) In its said answer, Petitioner prays for the dismissal of said complaint in intervention, and questions the right of the AFL and the discharged employees to intervene, on the ground that they have no interest in the subject matter of the order made by the Board or its enforcement, until such time as a final order is entered decreeing enforcement or denying it. (R. 159-160.) Petitioner submits that its prayer for dismissal of said complaint in intervention should be granted on the basis of the following authorities:

"It is settled that the Act creates no private right, and that there is no authority anywhere save in the Board itself to inaugurate proceedings for the enforcement of the Board's order or of the decree entered upon its petition. The award of back pay is not a private judgment or a chose in action belonging to the employee, and he has no property right in the award pending his actual receipt of it. Until that time the subject matter remains exclusively under the administrative authority of the Board and in control of the court, and outside interference of any sort would tend inevitably to shackle or impede the free exercise of their powers."

N.L.R.B. v. Sunshine Mining Co. (9th CCA; 1942), 125 Fed. (2d) 757 at 761.

"The union has asked leave to intervene. This proceeding is in the public interest, prosecuted by an authorized agency of the Government, in furtherance of an express policy and intent upon the part of Congress to establish, in behalf of the national public, a standard of conduct presumably productive of progress in protection of the public welfare. In such proceedings, private parties have no rightful place except as the court may desire to avail itself of helpful suggestions. Seeing no such necessity in this proceeding, we deny the application."

Aluminum Ore Co. v. N.L.R.B. (7th CCA; 1942), 131 Fed. (2d) 485 at 488.

NARRATIVE OF THE FACTS.

The record of this proceeding establishes that there is no history of hostility on the part of the Petitioner to the organization or unionization of its employees.

It is conceded that the Petitioner was engaged in interstate commerce and was thus subject to the provisions of the National Labor Relations Act (29 U.S. C. A. 151, et seq.) (R. 177.)

The Petitioner is a manufacturer of laundry and toilet soaps and glycerine. (R. 177; 559.) It maintains and operates manufacturing plants in various parts of the United States, including one located at Berkeley, County of Alameda, State of California. (R. 177.)

The events out of which this proceeding arises occurred at Petitioner's Berkeley plant. At the time of the happening of these events, Petitioner was manufacturing glycerine for war purposes and was producing it at the rate of between four and five hundred thousand pounds per month. (R. 559.) The course of these events extends from July 26, 1945 to October 15, 1945, but there are other occurrences which preceded and followed them, which have an important bearing on the case and which must of necessity be considered in arriving at a decision herein.

Petitioner's employees were first organized in 1936. At that time and for approximately two years thereafter, the I.L.A., affiliated with the American Federation of Labor, was the bargaining agent for said employees. Subsequently, on or about 1938, the employees

shifted their allegiance from the I.L.A. to the CIO. (R. 286; 625.) The CIO is, was and had been, since 1938, the bargaining agent for Petitioner's employees in the proper bargaining unit.

On or about July 9, 1941, the CIO, as the bargaining agent of Petitioner's employees, entered into a collective bargaining agreement with Petitioner. (R. 221-223.) Section 3 of this contract has an important bearing on the issues presented by this case. Section 3 reads as follows:

> "Section 3. The Employer agrees that when new employees are to be hired to do any work covered by Section One (1), they shall be hired thru the offices of the Union, provided that the Union shall be able to furnish competent workers for work required. In the event the Union is unable to furnish competent workers, the Employer may hire from outside sources, provided that employees so hired shall make application for membership in the Union within fifteen (15) days of their employment. *The employees covered by this agreement shall be members in good standing of the Union and the Employer shall employ no workers other than members of the Union subject to conditions herein above prescribed.* In the hiring of new help for the warehouses, they shall be hired through the offices of the Warehouse Union, Local 1-6, I.L.W.U." (R. 787-788.) (Italics ours.)

It has been admitted by the Board and by the AFL that the contract was, during the period covered by the events out of which this proceeding arose, valid; that the Board did seek to set it aside, and further

that the CIO was not dominated by the Petitioner. (R. 170-171; 271; 178-179.)

The Petitioner employed at its Berkeley plant at or about the time of the events herein narrated, 313 persons, exclusive of foremen, supervisory and executive employees. (R. 422.)

The management of the plant was in the hands of the following named gentlemen: Mr. Charles Wood, Mr. Bert W. Railey, Mr. C. A. Altman, Mr. C. R. Carter and Mr. Don E. Stanberry. (R. 180-182.) Mr. Wood was the purchasing agent for the respondent and in charge of its labor relations. (R. 180; 720.) Mr. Railey was vice president of the Petitioner, in charge of operations and all business of the Western Division of Petitioner, which includes Kansas City and Berkeley. (R. 181; 521.) Mr. Altman was plant superintendent (R. 182; 666); Mr. Carter was process supervisor (R. 181-182; 704); and Mr. Stanberry was production supervisor. (R. 182; 716.)

Clyde W. Haynes, Dave Luchsinger, Frank Marshall, Sanford Moreau and Harry A. Smith were on July 26, and for some time prior thereto, members of the CIO, employees of Petitioner and shop stewards in charge of policing the contract above referred to on behalf of the CIO. (R. 193; 255-257.)

Prior to July 26, 1945, certain matters which are of importance herein, had come to the notice of Mr. Wood and the management of Petitioner. The CIO had pledged itself not to engage in any strike or other work stoppage for the duration of the war. (R. 420-

421; 506-507.) This fact was and is in the knowledge of millions of persons throughout the United States and was known to Mr. Railey and Mr. Wood. (R. 561-562; 725.) This should be borne in mind because of the work stoppage at Petitioner's plant which is hereinafter referred to. Another fact, known to Mr. Wood as well as to thousands of persons in the State of California and elsewhere, was the strong stand taken by the CIO against racial discrimination. (R. 725-726.) Other matters were also known by Mr. Wood and the management which were not in the public knowledge. Mr. Wood knew that Messrs. Haynes, Luchsinger, Moreau and Smith had been accused of working against the established policies of the CIO for a long time, including the CIO's policy against racial discrimination, and in this connection, Mr. Wood knew that in 1944 the stewards had been taken before the grievance committe and found guilty of conduct unbecoming stewards and given a reprimand for their failure to take up the complaints of Negro members. (R. 725-726; 763-765.) Information had also come to Mr. Wood of the fact that the stewards had been accused of being remiss in carrying out their duties of office, and specifically that they had been negligent in appointing a chief steward as was apparently required by Section 10 of the contract above referred to. (R. 765.) Other information which had come to Mr. Wood with respect to the stewards was that they had failed to attend meetings of the executive council; had failed to call or refused to call a meeting of Petitioner's employees for the purpose of discussing current contract negotiations, airing

grievances of the rank and file, and electing stewards for the coming year. (R. 766-768.)

From the foregoing it may be gathered that the management of Petitioner knew prior to July 26, 1945 that the CIO had adopted certain policies which it was enforcing thoroughly, earnestly and sincerely, as well as that there was certain dissatisfaction with the manner in which the aforementioned five stewards had performed their duties and enforced the policies of the CIO.

On July 26, 1945, there occurred the first event which led to the filing of the charges here under consideration. On that date, twenty-eight to thirty employees of Petitioner, including the five stewards, held a dinner meeting. (R. 189-90; 260-261; 286-287; 382-383.) The record does not disclose whether other employees of Petitioner had cognizance of this meeting, *but it is clear that Petitioner had no knowledge thereof*, and this is admitted by the Board.

This meeting was held for the purpose of discussing working conditions at Petitioner's plant, and for the purpose of outlining plans to sever connections with the CIO and affiliating or attempting to convince Petitioner's other employees to affiliate with some other local having a strong international. (R. 189-90; 260-261; 286-287; 408-409.)

Among those present at the meeting, in addition to the five stewards, were William Sherman, a one-time business agent of the CIO, who had been defeated for reelection (R. 190; 414), Edwin Thompson, Lincoln Olsen and Harold Lonnberg. (R. 190-191;

260-261.) These gentlemen are mentioned at this point because they all played important parts in the events hereinafter narrated, and were instrumental in bringing about the work stoppage at Petitioner's plant, hereinabove mentioned.

It was determined at this dinner meeting that an interim organization be formed, pending affiliation with a local having a strong international, and it was given the name of "Colgate-Palmolive-Peet Company Employees' Welfare Association." Of the name given to this interim or stop-gap organization, Mr. Lonnberg, one of the gentlemen above referred to, had this to say: *"The title of it may seem misleading* * * *." (R. 340.)

On July 28, 1945, pursuant to plans formulated at the dinner meeting, Frank Marshall, one of the stewards, posted notices in several of the buildings in Petitioner's plant. (R. 191-192.) These notices read as follows:

> "Special meeting for all those interested in joining Employees' Welfare Association at the Finnish Brotherhood Hall, 1970 Chestnut Street, across from Burbank School, at 4:15 P. M., Monday, July 30, 1945." (R. 213.)

According to Mr. Marshall, the notices were posted by him at about 1:15 P. M., on July 28. (R. 192.) Sometime thereafter one of the notices was seen and read by Mr. Altman. (R. 667-668.) Later in the day, he received a 'phone call from Mr. Wood, and he advised Mr. Wood of the fact of the posting of the notice and of the contents thereof. Mr. Wood did not

discuss the notice or its contents with Mr. Altman (R. 668), and at the hearing testified that he imagined from what had been reported to him that the employees were perhaps getting up some sort of a welfare association for credit facilities, but did not associate it in any way with an organization set up for the purpose of collective bargaining. (R. 721-722.)

Prior to the holding of the announced meeting, Messrs. Luchsinger and Olsen saw Mr. Altman and requested that he grant a "lay-off" of two hours to the night shift employees to enable them to attend the meeting, and Mr. Altman acceded to the request. (R. 268-269.) There is nothing in the record to show that these gentlemen or any other person gave Petitioner's representatives, prior to the time that the meeting was held, any information with respect to its purpose, or that Petitioner, at that time, learned through any means the purpose thereof. The Board, nevertheless, infers that Petitioner must have learned the *true* purpose "of the proposed meeting, or it would not have agreed to shut down the plant * * * so that the employees * * * could attend". (R. 69-70.) It is submitted that not only is the Board's reasoning invalid, but also that it is not entitled to rely on this inference because it could have procured direct evidence on the point through Olsen and Luchsinger.

On July 30, 1945, at about 1:45 P. M., a few hours before the time set for the meeting (R. 667), the customary routine of Petitioner's plant was disturbed by the appearance in Mr. Altman's office of five officers of the CIO. One of the CIO officers, Mr. Paul

Heide, handed Mr. Altman a letter. (R. 668-669.) This letter, Board's "Exhibit 3" (R. 784-785) reads as follows:

"July 30, 1945.

Colgate, Palmolive, Peet Company,
6th & Carlton Streets,
Berkeley, California.

Dear Mr. Altman: Att: Mr. C. A. Altman

This is to notify you that charges have been preferred by this Union against the following employees of your Company, and that they have been suspended from membership of this organization pending a trial as provided for in the Constitution of our Local Union:

Clyde W. Haynes, R.F.D. No. 2, Box 884, Walnut Creek, Calif.

Dave Luchsinger, 434 65th Street, Oakland.

Frank Marshall, Rt. 1, Box 241, Walnut Creek, Calif.

Sanford Moreau, 1004 Jones Street, Berkeley, Calif.

Harry A. Smith, Box 243, Rt. 6, Walnut Creek, Calif.

We, therefore, respectfully request that the above named employees of your Company be immediately removed from the job until such time as the charges against them have been determined by this organization.

Trusting that we may have your cooperation in this matter, we remain,

Very truly yours,

/s/ Paul Heide.

Paul Heide, Vice-President"

Mr. Altman was much upset by the contents of this communication and he went to Mr. Railey's office to confer with him. Thereafter, Mr. Altman returned to his office accompanied by Mr. Railey. Mr. Railey acted as spokesman for Petitioner. (R. 669-670.) The substance of what then occurred is contained in the following excerpts taken from the testimony of Mr. Railey:

"Q. Will you relate to the best of your recollection the gist or substance of that conversation?

A. We told these people that this was—came as a great surprise to us, literally a bombshell, we knew nothing about what it was about, or any reason why these men should be suspended, and protested the thing because we told them they had been loyal employees as far as we were concerned, and we had no charges against them. We were quickly reminded of our contract with the CIO which specified—which carried a paragraph to the effect that all employees must be in good standing with the union to work at our plant.

Q. Was the contract produced?

A. It was called to our attention, this particular paragraph that I refer to.

Q. Was the contract itself or a copy of the contract—

A. (interposing) A copy of the contract was read at the time.

Q. I will show you Board's Exhibit 7 and have you look at it. It purports to be a copy of a contract between the Respondent and the I.L. W.U., and see if you can pick out the clause you have reference to.

A. (Examining contract) Well, of course, I don't have reference to the number of it. I can find it.

Q. I think I will save you time and tell you it is on the first page, Mr. Railey.

A. (Indicating) That is the clause that I am referring to.

Q. Will you specify the number of the clause?

A. Section 3.

Q. You discussed that clause with the representatives of the CIO?

A. Yes, sir.

Q. Did any further conversation or discussion ensue after that?

A. These gentlemen that represented the CIO told us that these men must be discontinued immediately. They told us that they had sent a notice of their suspension to each man by registered mail, each man that was involved. They told us if we didn't discharge them they would.

Mr. Royster. I didn't get that answer, the latter part of it.

(The answer referred to was read by the reporter.)

Q. (By Mr. Hecht) What else happened, Mr. Railey?

A. It was finally agreed that we should call these five men into the office. When they came in——

Q. (Interposing) At this point you might name those five men, Mr. Railey.

A. There was Mr. —

Mr. Royster. They are in the letter.

Mr. Hecht. Yes.

The Witness. Mr. Marshall, Mr. Moreau, Mr. Haynes, Mr. Smith—May I look at this again and check my memory? (examining document) and Mr. Luchsinger.

Q. (By Mr. Hecht.) And you called them into your office?

A. We did.

Q. And what occurred then?

A. When they came to our office the CIO officials handed each of them a carbon copy of a letter which they stated had been mailed to their homes. These gentlemen looked at the letters briefly and crushed them in their hands and stuck them in their pockets and walked out of the office.

Q. No conversation between the five men?

A. No conversation.

Q. Between the five men and the CIO officials?

A. No.

Q. Any statement to you by these five men?

A. Not at the time, no. * * *" (R. 523-525.)

* * * * * * * *

"Q. (By Mr. Royster) Now, Mr. Railey, you testified that on July 30 you protested to the I.L.W.U. the requested suspension of these five stewards?

A. Yes.

Q. Now, how did you make that protest, what did you say?

A. Well, I couldn't tell you what I said. I can only give you a general idea of our feeling, which I can well remember, and what went on at the time. We might be classed as babes in the woods

on a thing like this, but it was something entirely new to us, and entirely unexpected, and when this letter was brought to me by Mr. Altman I admit that I was completely nonplussed. I didn't know what to do, or anything about it. At that time I didn't even recall the wording of the contract, which they maintained, and which our best advice afterwards seemed to bear out, that they had a right to suspend people, and as long as they were under suspension, or not in good standing with the Union, that they couldn't work there.

Q. Well, what did you say to the I.L.W.U. people by way of protest?

A. We told them we had no reason for discharging these people as far as we were concerned. It was brought to our attention that we had nothing to do with the matter.

Q. Did you ask them to reconsider their action at all?

A. We pleaded with them not to take action because we needed work, and we needed products, a very vital business, and there was no feeling on our part in connection with it." (R. 538-539.)

The record clearly indicates that nothing was said by anyone at this time which could have furnished information to Petitioner as to the causes underlying the suspension of the five stewards.

The record discloses that after the dismissal of the five stewards, copies of Board's "Exhibit 4" (R. 785) were distributed to Petitioner's employees. (R. 473.) This exhibit is a mimeographed notice and reads as follows:

"ATTENTION!
ALL WAREHOUSE UNION MEMBERS:

An illegal meeting has been called by certain employees of Peet's, now under suspension as members of this union for violation of the membership oath, and other illegal acts.

WARNING!!

Any member of Local 6 who attends such illegal meeting or participates in violations of our constitution, does so at the risk of losing membership and employment.

General Executive Board
Warehouse Union.
Local No. 6, I.L.W.U."

There is no evidence that Petitioner had knowledge of this notice or its contents.

The meeting announced by the notices posted by Mr. Marshall was thereafter held at the time and place specified in said notices. (R. 196.) It was stipulated by the parties that a substantial majority of Petitioner's employees attended this meeting. (R. 256-257.) According to Mr. Marshall, the following matters were acted upon at the meeting:

1. The membership elected Messrs. Olsen, Sherman, Lonnberg and Thompson, as a committee of four to negotiate with Petitioner's management for the reinstatement of the five stewards. (R. 196; 848-850.)

2. The membership voted to sever relations with the I.L.W.U. and to form the employees'

welfare association, pending affiliation with a strong international. (R. 198-201; 848-850.)

Mr. Marshall also testified that the resolutions proposing the above described acts were adopted by unanimous vote of the persons present. (R. 199-200.)

The minutes of the meeting were recorded by Mr. Thompson, one of the committeemen, and are in evidence as Intervenor's Exhibit 2. (R. 468-469; 848-850.) These minutes disclose that a strike was contemplated in the event the five stewards were not reinstated, and in this connection the minutes read as follows:

> "Motion that we go back to work tomorrow, pending settlement of 5 Brother Shop Stewards laid off by management at request of I.L.W.U. officials. *If shop stewards don't work, nobody works. Carried unanimously.*" (R. 849.) (Italics ours.)

The minutes further disclose that the withdrawal from the CIO was intended to be final and in all respects legal, and as to this, the following appears therein:

> "Wm. Stolba, L. Olsen, Dave Luchsinger, Wm. Sherman, E. H. Thompson, following general meeting, visited an attorney for legal reasons as to best way to complete severing relations with I.L.W.U. 1-6." (R. 849-850.) (Mr. Stolba, above named, was not a complainant in this proceeding.)

An attorney was in fact consulted and it was pursuant to his advice that certain telegrams hereinafter

mentioned were transmitted to Petitioner and to the CIO. (R. 469-470.)

It should be noted at this point that it was stipulated that all the discharged employees, with the exception of Calixto Rigo, Caetano Perreira, and Rose (Gilbert) Schneider, (a) attended the meeting of July 30, (b) concurred in the action taken at this meeting, (c) participated in the work-stoppage which began at noon, July 31, and (d) knew of the CIO's no-strike pledge. It was further stipulated that the following named employees pleaded guilty to charges made by the CIO of having participated in a wartime strike in violation of the CIO's no-strike pledge: Glenn Hixon, Martin Heppler, Thomas Azevedo, Manuel Souza, Robert Ashworth, Felix Denkowski, Vincent Barboni, Alden Lee, John Perucca, Manuel Munoz, Ann Cerrato, Rose Ros, Ina Mae Paige and Nick Tate. (R. 70; 71-72; 202-203; 258; 274; 296; 365-367; 404-405; 420-421; 506-507.)

The record also discloses that Albert Zulaica pleaded guilty to charges of violating the CIO's no-strike plege (R. 328-329), and Intervenor Exhibit 7 (R. 867) sets forth that Caetano Perreiro and Calixto Rigo pleaded guilty to similar charges made against them.

As stated above, telegrams were prepared and transmitted for the purpose of effecting the withdrawal of the employees from the CIO. One was sent to the CIO and the other to the Petitioner. They are practically identical in wording and are dated July 30, 1945. They read as follows:

"You are hereby notified that more than 200 employees of the Colgate-Palmolive-Peet Co., *all being former members of your Union* and being more than 50% of such employees by action taken for such purpose, have and do hereby withdraw from your Union, sever connections and refuse to be further bound by any of the laws, rules or regulations of the constitution of the I.L.W.U." (Sent to CIO; italics ours.) (R. 786.)

"You are hereby notified of action taken by more than 200 employees of Colgate-Palmolive-Peet Co. *All being former members of I.L.W.U. 1-6* and being more than 50% of total employees have withdrawn and severed relations with I.L.W.U. 1-6 as collective bargaining agent." (Sent to Petitioner; italics ours.) (R. 786.)

The gravamen of the charge made against Petitioner is that the employees were suspended from good standing by the CIO because of activity on behalf of the AFL, and that the Petitioner knew this when it removed them from the payroll, but the foregoing makes it abundantly clear that these employees on July 30, 1945, served notice that from that date onward, they refused to maintain their membership in the CIO—such maintenance of membership being a condition precedent to employment in Petitioner's plant under the contract above referred to. It is evident, therefore, that these employees placed themselves "not in good standing" at the very outset, and this being so, it cannot be contended that the CIO suspended them because of activity on behalf of the AFL. In connection with this matter, it should be

particularly noted that none of the employees ever repudiated the action evidenced by the above quoted telegram, except perhaps the seventeen who, as appears from Intervenor's Exhibit 7, stood trial on December 17, 1945.

On July 31, 1945, the committeemen above named, armed with the authority conferred upon them by the other employees, visited Mr. Altman and requested the reinstatement of the five stewards. Mr. Altman in answer to this request stated that the stewards could not be put back to work until they had been restored to good standing with the CIO. The committeemen then left Mr. Altman and went to Mr. Railey's office. Shortly thereafter, CIO representatives called on Mr. Altman and handed him a letter, which is Petitioner's Exhibit No. 16. (R. 671-673; 846.) This letter reads as follows:

"July 31, 1945

Colgate, Palmolive, Peet Company
6th & Carlton Streets
Berkeley, California

Dear Mr. Altman: Att: Mr. C. A. Altman

This is to notify you that the employees named below have been suspended from membership in this union and are no longer members in good standing.

Pending the determination of charges which have been filed against these persons in accordance with our Constitution and By-Laws, you are requested, in accordance with our Agreement, to remove these persons from your employ

until such time as you receive word from us in regard to their status as members in this union.

Ed Thompson, 1034 Virginia Street, Berkeley, Calif.

H. Lonnberg, 1245—60th Avenue, Oakland, Calif.

Lincoln Olsen, 623 Kearney, El Cerrito, Calif.

William Sherman, 1515 Kains Avenue, Berkeley, Calif.

Your immediate attention to this request will be appreciated.

Very truly yours,
/s/ Paul Heide
Paul Heide, Vice-President."

It should be most specially noted that when the above letter was delivered to Mr. Altman, the four men named in it had already committed themselves not to maintain their membership in the CIO and to participate in a wartime strike in the event that their request for the reinstatement of the five stewards was denied.

Upon receipt of this letter, Mr. Altman went to Mr. Railey's office where he found the committeemen conferring with Mr. Railey. (R. 673-674.) The committeemen were reiterating their demand that the stewards be reinstated and advised Mr. Railey that unless these men were put back to work, *they would not be responsible for the consequences.* (R. 525-526.) Thereafter, the CIO representatives, as well as the five suspended stewards also entered Mr. Railey's office. (R. 527; 674-675.)

Mr. Lynden, President of the CIO, speaking for it, stated that the men who had been suspended would have to stand trial and if found innocent would be permitted to return to work and would be indemnified by the CIO for lost time. (R. 675.)

It is clear from the record and from Intervenor's Exhibit 6 (R. 856) that these men refused to stand trial, thus further manifesting their already announced intent not to maintain their membership in the CIO.

The Petitioner's officers made inquiry at that time as to the nature of the charges brought against the committeemen but received for answer only the statement that they were not in good standing, and would have to stand trial. (R. 675-676.) Then there occurred in the presence of Petitioner's officers a verbal exchange between the nine suspended employees and the CIO representatives—Mr. Lynden and Mr. Sherman acting as spokesmen for their respective factions. The substance of this exchange appears in the following quotation taken from Mr. Railey's testimony:

> "Q. Can you relate the gist of this conversation or talk between the two men?
>
> A. Well, to boil it down, the C.I.O. people told this negotiating committee that these people would have to stand trial on the charges against them, they could not work until those charges were disposed of, and they repeatedly reminded them, reminded this negotiating committee of the oaths that they took when they joined the C.I.O. and the consequence of a violation of those oaths,

and assured them that they had done everything they could to get increases for the employees of the Company, pointed out that the wages were frozen, nothing they could do about it, nothing that the Company could do about getting an increase. And at one stage of the meeting, the negotiating committee, without any further ado, walked out." (R. 527-528.)

* * * * * * *

"Q. Yes, there was a pretty acrimonious exchange between the I.L.W.U. and the four committeemen during part of that meeting, was there not, Mr. Railey?

A. I don't know what is the right word to use for it. As I say, they were reminded of their oath, and of course, Mr. Sherman, who was speaking for the negotiating committee, accused the Union of failure to get increases for the men and for the people working there. And Mr. Lynden for the Union did bear down to the extent that they had taken an oath, and they had failed to observe it, and he pointed out what happened to a traitor for the United States, and they were a traitor to their Union, that they had the right to discipline their people. *In fact, he said—this was when the war was still on—he said they had many times been called upon to discipline people, keep them working.* And he said even in the shipyards they had been called upon to discipline people outside of working hours who were inclined to drive fast, or drink, or something like that, *to try to keep them working,* because the government said, 'Unless you straighten your man out he can't work here.' And it was a defense of the C.I.O. by Mr. Lynden, naturally, and their policies, and resentment on the part of Mr. Sher-

> man, who was a former Business Agent, and whether he was disappointed or what I couldn't say, but at any rate, he was obviously not in sympathy with C.I.O." (Italics ours.) (R. 545.)

It is clear from what has been narrated before that when Mr. Lynden spoke of being "called upon to discipline people, keep them working," that Petitioner already knew that certain of its employees, including the stewards and the committeemen, had bound themselves to engage in a wartime work-stoppage violative of the CIO's no-strike pledge, and that the CIO was in possession of the facts with respect to this project, but it is also equally clear that Petitioner did not learn anything respecting the alleged malicious and illegal motivation of the CIO, on which the Board relies to support its decision and order.

The foregoing incident terminated at about 9:30 a. m., and thereafter, the nine employees, as well as the CIO representatives, left the plant at Mr. Railey's behest. (R. 528-529.) At noon of the same day, that is, July 31, 1945, the majority of Petitioner's employees left their jobs and did not return to work until August 3, 1945. (R. 257-258; 529; 677.)

During the morning of July 31st, representatives of the CIO distributed copies of the following circular in the plant. (R. 257):

"Attention All Members
I.L.W.U. No. 6

Employed At Colgate, Palmolive, Peet Company
Look Before You Leap

Because of a constant campaign of misinformation and falsehoods carried on by Sherman-Marshall-Lundeberg & Co., many otherwise reliable members of our Union are being misled down a blind alley, and into action that can only result in losses and hardship for the membership involved. The unscrupulous people who are attempting to promote strike action at this plant are *traitors* to our Union membership, our flag and our country! All members who join with them are jeopardizing their own *reputation,* their *Union* standing, their *seniority* and their *jobs!* Any strike at plant will bring an *immediate* directive from the Regional War Labor Board to return to work—and will resolve *no* issues—fancied or otherwise!

So that all members may understand the *true* situation, the following is a copy of agreement extending the provisions of the Union contract, including the requirement that *only members of Warehouse Union, Local No. 6, I.L.W.U., in good standing* may be employed by the company, it will be enforced by the entire membership of our Union, if it becomes necessary." (R. 789-790.)

It will be noted that although this circular by its terms described the "unscrupulous" persons who were "attempting to promote strike action" as "traitors" to the "Union membership, our flag and our country", that the Board has misdescribed it merely as a

"warning" to the "employees that they might lose their jobs by assisting the CIO 'traitors' ". (R. 71.) The unfairness of this misdescription is made obvious by the fact that the Board fails to mention the fact that the "warning" was directed against participation in the strike. On the other hand, the fact of the CIO's ample justification for issuing this "warning" must be conceded when the terms of its pledge against wartime strikes are considered. In substance, this pledge stated the following:

> "On behalf of the entire membership of the International Longshoremen's & Warehousemen's Union we renew and give to President Harry S. Truman and the nation our solemn pledge that until the war is ended, with the unconditional surrender of Japan, we will not strike, stop work, or cease or slow production for any reason whatsoever.
>
> "We reiterate that this is an unconditional pledge given in the knowledge that our first duty is to our nation, and that despite provocation we must take no action that will imperil our nation or cause the prolongation of the war, or cause the unnecessary loss of so much as one Allied life.
>
> "We further make the positive pledge that we will do everything in our power to shorten the war by lending ourselves to intelligent solution of the manifold manpower problems and to the development of all possible means to speed production." (R. 420-421.)

We believe that this Court has judicial knowledge of the fact that the great majority in this country

shared the CIO's conviction that no action should be taken that would "imperil our nation or cause the prolongation of the war, or cause the unnecessary loss of so such as one Allied life."

In connection with the foregoing it should be specially noted at this point that loss of membership and jobs was threatened not because of activity on behalf of another labor organization, but because of participation in an unauthorized strike. Thus, ample warning against this action was given all employees, including those who participated in the work-stoppage in disregard thereof and were eventually discharged for this reason.

On the afternoon of July 31, 1945, Mr. Railey at the request of Mr. Thompson, attended a meeting at the Finnish Hall. There, Mr. Railey was again requested to reinstate the suspended employees and after some discussion he refused to do so on the ground that under the closed shop provision of the contract, the Petitioner was unable to do so until the men had been restored to good standing. (R. 529-531.)

After Mr. Railey left, those present at the meeting reaffirmed their vote not to return to work until the stewards were reinstated and the meeting was recessed and thereafter resumed on the evening of August 2. (R. 258.)

On August 2, a motion was approved dissolving Colgate-Palmolive-Peet Co. Welfare Association and to affiliate with the A.F.L. A further motion to return to work was also adopted at this meeting. (R. 258.)

On August 3, 1945, as above related, Petitioner's employees returned to work with the exception of the five stewards and the four committeemen. (R. 258.) It was also on August 3, 1945 that the A.F.L. filed a petition with the Board seeking certification as bargaining representative for Petitioner's employees. (R. 549.) Notice of the filing of this petition came to the knowledge of Petitioner's management on or about August 8, 1945. (R. 549.)

Mr. Wood in charge of Petitioner's labor relations returned to Berkeley on August 1, 1945, while the strike was still in progress. (R. 724-725.) He had been fully informed by Mr. Railey as to the events which preceded the strike, and had formed an opinion, though not a definite one, as to the probable cause for the suspension of the five stewards and based this opinion on information he had respecting the CIO no-strike pledge and the stewards' reported failure to enforce the anti-discrimination policy of the CIO. (R. 725.) The knowledge Petitioner's management had respecting the probable causes of the suspension of the five stewards and committeemen was further supplemented by news reports which appeared in the local press during the period of the strike. These reports appear to have featured the issue of racial discrimination. (R. 533; 677-678.)

Petitioner's management did not rely solely on the interpretation given by the CIO representatives respecting the rights and liabilities of the parties under Section 3 of the collective bargaining agreement. Mr. Wood returned to the plant on August 1, 1945 and by

that time, Mr. Railey had already consulted and obtained from Petitioner's attorneys an opinion on this section of the contract. This opinion advised the management that Petitioner had to comply strictly with the terms of the section and that Petitioner could not take upon itself the prerogative of passing upon the merits of the action taken by the CIO in suspending the stewards and the committeemen. Mr. Wood testified that Petitioner acted in accordance with the advice received from counsel. (R. 726-727.)

On August 14, 1945, the Board gave notice of hearing of the AFL's petition for certification, and this notice was received by the Petitioner on August 17, 1945. (R. 549.)

The first unfair labor practices charge preferred by the AFL against Petitioner was filed with the Board on August 14, 1945. (R. 92-93.) The charge set forth that Petitioner was engaging in unfair labor practices, within the meaning of the National Labor Relations Act, in that it had terminated the employment of the five stewards and the four committeemen, *"because of their refusal to adhere to policies of" the CIO.* (R. 92-93.)

On August 17th the five stewards and the four committeemen applied to Petitioner for reemployment. Mr. Wood, acting for Petitioner, rejected their application. (R. 728.)

When this application for reemployment was made, the nine men involved had not repudiated their refusal to maintain their membership in the CIO.

We deem it appropriate, at this point, to call attention to the conclusion drawn by the Board from the charge filed by the AFL against the Petitioner, and from the Petitioner's refusal to reinstate the stewards and the committeemen. The Board said:

> "* * *, the respondent, when it refused the reinstatement application of these two groups of discharged employees on August 17, 1945, *was clearly apprised of the nature of the dismissals by the formal charges of discrimination which the A. F. of L. had filed with the Board.*" (R. 77-78.) (Italics ours.)

It is hard to imagine how the Board concludes that the Petitioner was "clearly apprised" of the nature of the dismissals by a charge that stated that the men were discharged "because of their refusal to adhere to policies" of the CIO. The most that Petitioner could gather from this statement is that the employees had lost standing because of their failure to adhere to the CIO's policy against war-time strikes. It is, therefore, submitted that the Board's conclusion would have been infinitely more accurate had it stated that Petitioner learned nothing with respect to the alleged motivation of the CIO from the contents of the charge.

On September 1, 1945, representatives of the CIO posted themselves outside of Petitioner's plant, prior to the start of operations, and engaged in what appears to have been a mass checking of dues' books. (R. 709-712.) The record shows that there was a custom of many years standing which permitted CIO

representatives to check dues' books and collect dues at Petitioner's plant.

On the day prior to the dues' checking incident, to-wit, August 31, 1945, Mr. Gleichman, a CIO representative, came to Mr. Wood requesting the suspension of a long list of employees *and stated in support of his request that the persons involved were in bad standing, that some of them had not paid their dues and that others were not members of the CIO.* Mr. Wood refused to accede to this request and took the matter up with Mr. Heide, another CIO official. (R. 728-732.)

On the day following the dues' checking incident, that is, September 1, 1945, Mr. Altman received a letter from the CIO, which is Board Exhibit No. 10. (R. 792-793.) This letter reads as follows:

"September 1, 1945

Colgate-Palmolive-Peet Company,
6th & Carlton Streets
Berkeley, California.

Dear Mr. Altman:— Att: Mr. C. A. Altman

This is to notify you that the employees named below have been suspended from membership in this Union and are no longer members in good standing.

Pending the determination of charges which have been filed against these persons in accordance with our Constitution and By-Laws, you are requested, in accordance with our Agreement, to remove these persons from your employ until such

time as you receive word from us in regard to their status as members in this Union.

Rose Ross	Martin Heppler
Esther Young	Bill Howard
Ina M. Paige	Glen Hixon
Ophelia Reyes	Alden Lee
Kay Norris	Al Barboni
Ann Cerrato	Felix Denkowski
Henry Giannarelli	A. L. Richards
Manuel Souza	Terry Anderson
Albert Zulaica	K. Periera
Mike Ramirez	

Your immediate attention to this request will be appreciated.

Yours very truly,
/s/ Paul Heide
Paul Heide, Vice-President"

Mr. Altman advised Mr. Wood of the receipt of this letter and he in turn informed Mr. Railey. (R. 732-733.) The events which followed the receipt of this letter were related by Mr. Wood as follows:

"I * * * came down to the plant and found Mr. Railey in his office when I got there. I was showed the letter and we discussed the procedure we should follow to let out such a large group of men.

Mr. Railey wanted to soften the blow as much as possible. A lot of them had been there a long time and he did not like them to think we were throwing them out without any consideration. So it was decided that we would call them into his office. And Mr. Altman took the responsibility of having all these people notified that they should

come down. It took some little time to gather them. But after they got there, why we showed them the letter and told them that we were very sorry but under the terms of our contract we had no alternative except to abide by its terms." (R. 733-734.)

Prior to the dismissal of the persons named in Exhibit 10, Mr. Wood made inquiry from Mr. Heide as to the reasons why they were being placed in bad standing and he testified that the only answer he got in response to this inquiry was that these persons had violated their oath, the Constitution and By-Laws. (R. 736.)

As late as September 15, 1945, Mr. Wood had been unable to form a definite opinion as to the reasons underlying the suspension of these persons and in this connection he testified as follows:

"Q. All right. On September 1, 1945, or let us even carry it further, September 15, 1945, had you, Mr. Wood, formed any definite opinion for the reason why these men were being put in bad standing by the union?

A. No, I hadn't. I was somewhat bewildered.

Q. What was the reason for your bewilderment?

A. Well, I didn't think that it was only for union activities alone, because many people had not been disturbed that I had observed wearing buttons and passing out literature.

Trial Examiner Ruckel. What kind of buttons and what kind of literature?

The Witness. The A. F. of L. buttons.

Q. (By Mr. Hecht) Are some of those persons still in your employ, Mr. Wood?

A. They are." (R. 736-737.)

* * * * * * *

"Q. (By Mr. Hecht) Did those persons, Mr. Wood, to whom you have reference, continue to wear the A. F. of L. button and pass out the A. F. of L. literature up to and including the date of the election?

A. They did, sir.

Q. Are those persons still in your employ?

A. They are." (R. 738.)

On September 26, 1945, a decision and direction of election was issued by the Board and on October 16, 1945 an election, pursuant to the decision and direction of election, was conducted among Petitioner's employees. (R. 549.) At this election the majority of votes was cast in favor of the CIO. (R. 550.)

Some time in November, 1945, Mr. Wood was informed by George Squires, one of the CIO stewards, that the five stewards and the four committeemen had refused to stand trial; had been tried *in absentia,* found guilty and expelled on charges of dereliction of duty, failure to enforce the anti-discrimination policy and participating in a strike during the war. (R. 741-742.) In early January, 1946, Mr. Wood acquired knowledge from the CIO stewards, and the CIO publication, "The Dispatcher", as to the status of the other complainants. He learned that some had pleaded guilty to the charge of participating in a strike and were on probation, and others had refused to stand trial on the same charge, but, nevertheless, had been tried *in absentia* and expelled. (R. 742-743.)

In addition to the information obtained from the stewards and "The Dispatcher", Mr. Wood had also received copies of the written decisions of the CIO trial committees before whom the employees had been tried. (R. 762.) These decisions are in evidence as Intervenor's Exhibits Nos. 6 (R. 856) and 7. (R. 867.)

The following extract taken from Intervenor's Exhibit 6 establishes that Petitioner's management would have been most ill-advised if it had attempted to determine for itself, in the absence of a full dress inquiry into the internal affairs of the CIO, the causes underlying the suspension of complainants:

> "One thing we want to make very clear. We do not hold it against these men, or any of the other defendants, that they apparently joined the A. F. of L. Chemical Workers Union. If they thought the men could get a better deal through the A. F. of L., that was their right under the Wagner Act, as we understand it, just as A. F. of L. members have the right to change to the CIO if they want to. After all, that is a question for the rank and file to decide. Undermining union policies is something else. Policies such as political action, equal rights for all races and colors, and the wartime no-strike pledge are fundamental to the welfare of the union and its members. The union cannot and should not tolerate such conduct." (R. 865-866.)

It is submitted that the record herein shows a situation where the *admitted* participation by the discharged employees in an "outlaw" strike furnished the CIO with valid grounds and good cause to suspend

or expel them from membership, and to validly invoke the closed shop provisions of the collective bargaining agreement. We submit that the malicious motivation of the CIO, even if it had been proven, does not, under established law, convert the enforcement of its legal rights into an unlawful act, and that, therefore, the issue of the CIO's motivation is a false one.

ASSIGNMENTS AND SPECIFICATIONS OF ERROR.

1. The Board erred in its refusal to dismiss the complaint, because there is no evidence to establish a violation of Section 8(1)(3) of the National Labor Relations Act.

(This assignment depends for its validity on assignments 2 to 10 below.)

2. The Board erred in its decision and order, in that it thereby construed the National Labor Relations Act as giving it power to prohibit the coercion of employees by other employees or labor organizations.

(This assignment discussed, infra, pp. 58-84.)

3. The Board erred in its decision and order, in that it thereby construed the National Labor Relations Act as giving it power to find a labor organization guilty of unfair labor practices and to regulate the affairs of such labor organization.

(This assignment discussed, infra, pp. 58-84.)

4. The Board erred in its decision and order, in that it thereby has construed the National Labor Rela-

tions Act as permitting it to define and punish the unfair labor practices of labor organizations.

(This assignment discussed, infra, pp. 58-84.)

5. The Board erred in its decision and order, in that it has so construed the National Labor Relations Act as to empower it to prohibit the performance of an admittedly valid "closed shop" contract because of alleged unfair labor practices committed by the contracting union.

(This assignment discussed, infra, pp. 58-84.)

6. The Board erred in its decision and order in finding and concluding that the CIO's alleged unfair or malicious motivation deprives it of the legal right to discipline its members because of a plain and clear violation of its policies.

(This assignment discussed, infra, pp. 85-91.)

7. The Board erred in its decision and order in finding that the Petitioner had a legal right and obligation to refuse to perform an admittedly valid "closed shop" contract, because it allegedly knew the CIO's allegedly malicious motivation in requesting the discharge of employees under the terms of said "closed shop" contract.

(This assignment discussed, infra, pp. 76-80.)

8. The Board erred in its decision and order because there is not sufficient proof of the CIO's alleged unfair or malicious motivation in requesting the discharge of the employees pursuant to the terms of the "closed shop" contract.

(This assignment discussed, infra, pp. 91-123.)

9. The Board erred in its decision and order because there is no proof that the Petitioner knew that the CIO had requested the discharge of the employees because of their anti-CIO activity.

(This assignment discussed, infra, pp. 91-123.)

10. The Board erred in its decision and order because there is no proof that the Petitioner made no bona fide effort to evaluate the evidence before it, and in failing to determine, as did the Board, that the CIO was motivated by a desire to punish the employees because of their anti-CIO activity when it requested their discharge.

(This assignment discussed, infra, pp. 91-123.)

11. The Board erred in its decision and order, in that said order deprives the Petitioner of property without due process of law, inasmuch as Petitioner is called upon under the terms of said order to make whole the discharged employees for any loss of pay they have suffered since the termination of their employment, and deprives Petitioner of its property rights and privileges accruing to it under its contract, contrary to the Fifth Amendment to the Constitution of the United States.

(This assignment depends for its validity on assignments 2 to 10 above.)

ARGUMENT.

1. THE PETITIONER WAS ENTITLED TO A DISMISSAL OF THE COMPLAINT BECAUSE THE NATIONAL LABOR RELATIONS ACT DID NOT PROHIBIT THE COERCION OF EMPLOYEES BY LABOR ORGANIZATIONS, AND THEREUNDER A LABOR ORGANIZATION COULD LAWFULLY REQUIRE THE PERFORMANCE OF A "CLOSED SHOP" CONTRACT EVEN THOUGH SUCH PERFORMANCE RESULTED IN THE COERCION OF EMPLOYEES.

Petitioner's reasons for requesting the Court to reconsider the question resolved by it in the case of Local 2880, etc., v. N.L.R.B., 158 Fed. (2d) 365.

The argument above summarized was rejected and held invalid by this Honorable Court in *Local 2880, etc. v. N.L.R.B.* (1946), 158 Fed. (2d) 365 (cert. granted; 331 U.S. 798, 91 L. Ed. 1077). On the other hand the Circuit Court for the Seventh Circuit, in *Aluminum Co. v. N.L.R.B.* (1946), 159 Fed. (2d) 523, accepted this argument and held it valid. It had been hoped that the conflict created by these two decisions would be resolved by the Supreme Court of the United States in its expected review of *Local 2880, etc. v. N.L.R.B., supra;* however, this expectation cannot be realized because Local 2880's petition for certiorari was dismissed, at its request, on January 5, 1948, and the case has been removed from the calendar of the Supreme Court.

The Supreme Court's failure to resolve this conflict and the necessity of protecting the record, compel us to raise this question and to respectfully request the further consideration thereof by this Court.

In our study of this Court's opinion in *Local 2880, etc. v. N.L.R.B., supra,* we note that the Court did

not discuss or mention the pertinent Congressional reports which accompanied the adoption of the National Labor Relations Act. We feel that these reports militate against the position taken by the Board on this question of law. Therefore, our discussion of this point will concern itself for the most part with the history of the Act and these reports.

Statement of Board's argument in support of its right, under the National Labor Relations Act, to declare unions ineligible to be parties to "closed shop" contracts.

This Court has stated the position of the Board on this question as follows:

> "The Board's construction of the proviso of Section 8(3) with relation to Section 7 conferring on * * * all employees the right 'to bargain collectively through representatives of their own choosing' as not warranting a discharge for activities at an election for such choice is obviously rational * * *" (158 Fed. (2d) at 368.)

The reasoning of this Court in upholding the views of the Board is, we think, set out in the following portions of the opinion:

> "However, we are of the opinion that it is the only interpretation to be given the proviso of Section 8(3) for closed shop contracts. Such contracts are generally drawn, as here, in anticipation that during their currency there will be elections at which the employees will be given their opportunity to choose the bargaining agent through whom, as provided in Section 7, they will 'bargain collectively' with their employers. If they are to exercise this right under Section 7 *in*

terrorem of discharge, because its exercise may displease the union successful at the election, that 'labor organization' will be 'assisted by * * * action defined in * * * Section 8(1) as an unfair labor practice' in violation of the express language of the proviso." (158 Fed. (2d) 368.) (Italics ours.)

* * * * * * *

"We construe the discharge provision of the instant closed shop contract as not intended to include an obligation on the employer to discharge an employee for the exercise of the latter's right to seek at an election of his bargaining agent a labor organization other than the one having an existent closed shop contract. If the union is so organized that exercising such right at the election prevents an employee, otherwise complying with the union's membership requirements, from remaining in the membership—that is, if the union is organized so to compel the closed shop employer to commit an unfair labor practice—*such a union is ineligible to become a party to a closed shop contract* under the provisions of Section 8(3)." (158 Fed. (2d) 369.) (Italics ours.)

* * * * * * *

"The contention is unwarrantable. The petitioner does not deny that the employee is so held in terrorem of violation of the union's requirements of its members. Such fear is obvious and Congress well may be presumed to have recognized its existence as a factor in making effective all proper closed shop contracts. Because it is an effective factor as to all the legal incidents of a closed shop contract nonetheless makes such fear a factor in a union's wrongful attempt to defeat the Congressional purpose to democratize the em-

ployees' organization by a free election of their bargaining agent." (158 Fed. (2d) 370; Opinion on Petition for Rehearing.)

We understand from the foregoing the Board's argument, reduced to the simplest terms, to be as follows:

A labor organization which so coerces an employee as to cause him to exercise the rights guaranteed by Section 7 *in terrorem of discharge,* is ineligible to become or remain a party to a closed shop contract, and a discharge by the employer pursuant to a closed shop contract vitiated by the ineligibility of the coercing union is assistance of the type defined by the Act as an unfair labor practice. We also understand from this that it is immaterial in the Court's view whether the vitiating conduct occurs before or after the execution of the closed shop agreement.

Major premise of Board's argument depends for its validity on the truth of the assumed proposition that the coercion of employees by unions has been prohibited by Congress.

In our opinion the Board's argument depends for its validity on the proposition that a labor organization which coerces employees "is ineligible to become a party to a closed shop contract", and this premise itself depends for validity upon the further assumed proposition that Congress intended to make illegal the coercion of employees by other employees or labor organizations. In other words, the Board's right to declare the ineligibility of a union and to deprive it of its contract must be predicated on the assumption that the coercion of employees by labor organizations

offends against some mandate of Congress; otherwise this would be deprivation of property without reason or cause. We say that this is an "assumed" premise, because there is nothing in the express language of the National Labor Relations Act which declares that employees are afforded protection thereunder against interference from persons other than employers or those acting on their behalf. The only unfair labor practices denounced and defined by express language in the Act are those committed by employers. The Court, therefore, no doubt had this implied or assumed premise in mind when it stated that "Congress well may be presumed to have recognized" the existence of fear induced by union coercion as a factor in making effective closed shop contracts. (158 Fed. (2d) 370.) The Court's statement is a correct one, but there is no necessity of presuming that Congress recognized this factor because Congress did in fact expressly recognize it. However, Congress, in expressly recognizing the fear factor induced by union coercion, also expressly declared that it did not intend to and would not make any provision in the National Labor Relations Act to protect employees from such coercion and from the fear thereby induced.

The premises of the Board's argument are false, because Congress expressly stated that it did not intend to prohibit the coercion of employees by unions or to provide for the regulation of unions.

No clearer statement of Congressional purpose not to forbid coercion of employees by employers or labor organizations is to be found than in the express lan-

guage of the Congressional reports which accompanied the adoption of the National Labor Relations Act. We refer the Court in this connection to the following taken from these reports:

> *"Regulation of employees and labor organizations is no more germane to the purpose of this bill than would be the regulation of employers and employer associations in connection with the organization of emloyers in trade associations.*
>
> *There is an even more important reason why there should be no insertion in the bill of any provision against coercion of employees by employees or labor organizations;* courts have held a great variety of activities to constitute 'coercion'; a threat to strike, a refusal to work on material of non-union manufacture, circularization of banners and pulications, picketing, even peaceful persuasion. In some courts *closed shop agreements* or strikes for such agreements *are condemned as 'coercive'*; thus, *to prohibit employees from coercing their own side would not merely outlaw the undesirable activities which the word connotes to the layman, but would raise in federal law the ghosts of many much-criticized injunctions issued by courts of equity against activities of labor organizations—ghosts which it was supposed Congress had laid low in the Norris-LaGuardia Act."* (Italics ours.) See Senate Reports, Vol. 9877, 74th Congress, First Session, R. 573, to accompany S. 958, May 2, 1935, at page 16.

For the Board to declare a union ineligible to become party to a "closed shop" contract and to deprive it of its contract is, in effect, *regulation* by the Board

of labor organizations, and such *regulation* of labor organizations, the above Congressional report tells us, is not "germane to the purposes of" the National Labor Relations Act. To prohibit the performance of a "closed shop" contract because it results in the coercion of employees by labor organizations, is in effect, "to prohibit" employees and unions "from coercing their own side," and this prohibition, it is clear, was not the intent or purpose of Congress. Congress having *expressly* and emphatically declared that it did not intend to regulate unions, and having *expressly* defined and denounced in the Act itself *only* the unfair labor practices of employers, there is, we submit, no excuse, reason or cause for implying, presuming or assuming such a regulation or such a prohibition.

It is clear, therefore, that in coercing its own side a union did not, prior to the enactment of the Taft-Hartley Act, indulge in culpable conduct, violative of any Congressional mandate. Accordingly, it is respectfully submitted that the major premise of the Board's argument on this question of law is false, and that therefore this Court is not required, in this instance, to accept the "experienced judgment" of the Board.

It is also clear that since such conduct is not culpable that there is no cause or reason for declaring the ineligibility of a union as a party to a "closed shop" contract and to deprive it of its contractual rights. This being so, it follows that the second or minor premise of the Board's argument is also false.

It is likewise patent, that if there has been no vitiating conduct that when a discharge is made by an employer pursuant to a "closed shop" contract, a labor organization *is not,* as the Board concludes, " 'assisted by * * * action defined in (Section 8(1) as an unfair labor practice' in violation of the express language of the proviso" of Section 8(3).

Moreover, if there has been no assistance given to the union by the employer through any unfair labor practice, the contract is valid under the proviso and both the union and employer may insist on its performance.

The background of the Wagner Act and the reasons for its one-sided and defective approach to the problem sought to be resolved.

We submit in the light of the foregoing that the "Congressional purpose to democratize the employees' organization by a free election of their bargaining agent", mentioned by this Court, was, the Congress decided, to be implemented by elections *free from employer interference,* not elections free from union coercion, and this one-sided treatment of an old problem was the basic and the much criticized defect of the Wagner Act. The "one-sidedness" of the Act has long been recognized.

> "An additional reason constantly assigned for opposition to the act is its alleged one-sidedness in providing for unfair labor practices committable by employers without also providing for like employee unfair labor practices. Insistence upon this point has induced the legislatures of the

states of Massachusetts, Michigan, Minnesota, Pennsylvania and Wisconsin to provide for unfair labor practices committable by employees. Proponents of the act on the other hand have argued against the contention that the act is unfair because one-sided. The answer of the Act's proponents appears to be a twofold one. In the first place it is asserted that the common law and statute law of the several states and the Federal government are now adequate to deal with unlawful activities carried on by labor. In the law of torts, crimes and in the labor injunction along the various other legal sanctions are found adequate weapons to deal with labor activities which transcend the boundaries of legality."

Labor Disputes and Collective Bargaining (1940), *Teller,* Volume Two, Section 244, p. 695.

The problems and abuses which were to result from this defect were not then foreseeable. It is common knowledge that when the Act was drafted and adopted, that the schism in the labor movement, which culminated in open warfare between the AFL and CIO, had not occurred and was not anticipated. Therefore, Congress had no reason to provide in the Wagner Act a remedy to cure evils which might arise as a result of the then not anticipated breach in the ranks of labor. At the time this legislation was enacted it was anticipated that the contest would be only between organized labor, on the one side, and employers, nonunion employees and company dominated "employee representation plans", masquerad-

ing in the guise of so-called "independent unions", on the other. Therefore, employees were under this Act not to be free to remain unorganized or free from concerted union activities to organize them. The freedom or democratization intended was only freedom from employer autocracy. Those who drafted the Wagner Act knew, as the above quoted report discloses, that employers had been only too anxious to outlaw the "closed shop" contract as coercive, and too prone to attempt to defeat the organization of their employees by pretending to be protagonists of the nonunion man's right to remain unorganized. The right of the nonunion employee, usually championed by his employer, to remain unorganized, has been generally held to be, and to present a false or meritricious issue.

> "Invoking section 8(3) of the National Labor Relations Act instead of sections 921 and 923 of the California Labor Code in support of the trial court's injunction, plaintiff seeks to revive an issue settled by this court in *McKay v. Retail etc. Union No. 1067,* 16 Cal. 2d 311 (106 P. 2d 373); *Shafer v. Registered Pharmacists Union,* 16 Cal. 2d 379 (106 P. 2d 403), and *C. S. Smith Met. Market Co. v. Lyons,* 16 Cal. 2d 389 (106 P. 2d 414). It was there contended that the concerted activities were unlawful on the ground that their purpose was to compel the employer to violate sections 921 and 923 of the California Labor Code which, like the National Labor Relations Act, gives employees the right of association, self-organization, and designation of representatives free from the interference of employers. In rejecting this contention in *Shafer v. Registered*

Pharmacists Union, supra, the court stated: 'The argument is * * * made that it is absurd to suppose that these provisions were written with the intention of restraining the employer from influencing his employee, while at the same time conferring upon other individuals the right "to coerce" the same employee through the employer. But the right of workmen to organize for the purpose of bargaining collectively would be effectually thwarted if each individual had the absolute right to remain "unorganized" and using the term adopted by the appellants to designate the economic pressure applied against them through the employer, coercion may include compulsion brought about entirely by moral force. Certainly such compulsion is not made contrary to public policy by any statute of this state and is a proper exercise of labor's rights.' "

* * * * * * *

"The dilemma in these cases arises from a failure to understand that the basic conflict is between the union and nonunion workers. Until that conflict is resolved, the employer is in the unhappy position of a neutral suffering its repercussions. When he seeks to enjoin concerted union activities for a closed shop on the ground that their purpose is to drive him to unlawful interference with his nonunion employees, he is in fact seeking to translate a conflict between groups of workers in which union workers have an even chance of achieving their objective lawfully, into a conflict in which he would become the contestant *ad hoc* for the nonunion workers, armed with a formula that would make the very objective of the union workers unlawful. *The real issue of the closed shop would thus be shunted off the field to be*

replaced by the meretricious issue of the non-union workers' right to freedom from employer interference. That right, evaluated within the context of the right of workers and unions to take concerted action for a closed shop, does not include the right to freedom from the risk of employer interference induced by the pressure of such action. Employees are not free from concerted union activities to organize them directly; they are free to resist such activities." (Italics ours.)

Park & T. I. Corp. v. Int. etc. of Teamsters (1946), 27 Cal. (2d) 599 at 609-612, 165 Pac. (2d) 891, at 897-899.

The struggle between the CIO and AFL, engendered, as this Court knows, many abuses, including the denial of the democratic processes in unions to rank and file members. Organizations on both sides made frequent use of "closed shop" contracts to obtain the discharge of dissident employees for the purpose of perpetuating themselves in power.

The Ansley case. The Board recognizes that the Act does not prohibit the coercion of employees by unions.

The problem created by this abuse of the "closed shop" contract first received full consideration by the Board in *Ansley Radio Corp.* (1939), 18 N.L.R.B. 1028, some five years after the adoption of the Wagner Act. There the Board, fully aware of the purpose and history of the Act, determined in strict accordance with the express terms thereof and with the clear and express declaration of purpose contained in the congressional reports, that the contracting union

could invoke the "closed shop" provisons of the contract to secure the discharge of dissident members advocating another organization as the bargaining representative. In making this holding the Board gave express consideration to the history of the Act, and in so doing, stated the following:

> "The freedom guaranteed employees under the Act to form, join, and assist labor organizations and to bargain collectively through representatives of their own choosing, without economic or other compulsion by the employer, is qualified by the proviso clause of Section 8(3). The legislative history of this clause as well as its language shows that its purpose was to leave undisturbed by the Act, except in two instances, a form of industrial relationship which had won increasing acceptance by employers and had found widening approval in the law of the several States. The legislative intent and policy were to withhold what rights individual employees otherwise might have had under the Act but for the proviso in order to permit organized labor to seek and enter into this relationship where the employer was willing to do so and local law offered no obstacle."
>
> * * * * * * *
>
> "The proviso clause declares that 'nothing in this Act' shall preclude an employer from 'making' a closed-shop agreement with a labor organization 'if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.' Although the proviso relates specifically only to the *making* of the agreement, the necessary implication is that the employer is protected against a charge of discrimination under Section

8(3) in *carrying out* the closed-shop agreement as made, at least where, as here, the agreement is for a reasonable period of time." (*Ansley Radio Corp., supra,* 18 N.L.R.B. 1059-1061.)

The Act's failure to prohibit the coercion of employees by unions resulted in the recognition of the necessity of congressional intervention to democratize employees' organizations.

The abuse sanctioned by the Act and recognized by the Board in its above quoted opinion, developed to such proportions that many proposals to amend the Act were made by students of labor and its problems. One of many such proposals was made by Ludwig Teller in his work, "A Labor Policy for America." (Baker, Voorhis & Company, Inc.; 1945.) The Wagner Act's defects and its limited purpose is stated as follows by Mr. Teller:

> "It never hurts to reiterate that the Wagner Act is not a full blown labor relations statute. *It deals with only one segment of labor policy. Its limited purposes are to protect employees against employer interference with their right to form and join labor unions,* and to encourage collective bargaining between employers and bargaining agents representing a majority of employees in an appropriate bargaining unit." (Italics ours.)
>
> *A Labor Policy for America,* pp. 36-37.

Among the specific recommendations made by Mr. Teller to cure or mitigate this evil was one which would make it an unfair labor practice to:

> "(1) to deny a person membership in its organization, or to discriminate against any of its members, whether directly or indirectly, by reason

of his race, color or creed, national origin or political beliefs;

(2) to deny to any of its members any rights secured to him by its constitution and by-laws;

(3) to deny to any member the right to free discussion within the union, or to punish any member for exercising such right;

(4) to deny to any of its members the right to a fair and full hearing on all charges made against him, before persons other than those bringing the charges. In the case of appeal by any member to a higher body within the organization, such appeal shall be heard by a body separate from and independent of any person or body connected with the charges or any hearings on the charges."

A Labor Policy for America, p. 152.

These proposed unfair labor practices of unions were intended to effectuate legislation which had been advocated by the American Civil Liberties Union as early as 1943. The specific proposal of the Civil Liberties Union and the reasons underlying it are fully set forth in its publication "Democracy in Trade Union", and is referred to therein as "A 'Bill of Rights' for union members". (*Democracy in Trade Unions,* p. 68.)

Mr. Teller would also have made it an unfair labor practice on the part of the employer to discharge an employee pursuant to a "closed shop" provision unless there were first fulfilled certain conditions precedent. Mr. Teller's proposal was as follows:

"It should be an unfair labor practice for an employer, pursuant to a union security provision contained in a collective agreement, to discharge or otherwise to subject an employee to any disability in regard to the terms and conditions of his employment, unless the contracting union has certified to the employer in writing that the employee in question has finally exhausted his remedies within the union. The proposed Labor Court should have jurisdiction over cases of alleged improper expulsion from labor unions."

A Labor Policy for America, p. 168.

It is interesting to note that in making this proposal the author states: "The suggested unfair labor practice is designed to perfect a defect *in existing law.*" (Italics ours.)

Only another example of the recognition of this defect will suffice to make it clear that very few persons outside of the Board failed to recognize it.

"Labor unions are, of course, human institutions and are thus subject to the vices as well as the virtues of their leaders. In that respect, the closed shop presents the same dangers that are inherent in the concentration of power in the hands of officers of any institution—political, economic, or social. But it is obvious that the danger is much more minatory when the power is held by union officials who, through the usurpation of power of voluntary associations, may almost at will refuse membership to some workers or rescind it from others. In either case, under such abuses of the closed shop principle, the result is to deprive a man of the opportunity to earn his living. *Therefore, in order to safeguard that*

opportunity, while at the same time permitting the proper functioning of the closed shop, two important provisions are needed: (1) every union must be open generally to qualified workers on reasonable and non-discriminatory terms; *and (2) workers who have been refused membership and those who have been suspended or expelled from a union should be permitted to appeal their cases to an impartial chairman or a labor board.*

With these safeguards established to protect labor against exceptional abuses of power by some irresponsible union leaders, the natural 'God-given' right to work would be adequately protected." (Italics ours.)

"The Closed Shop" (1944), Toner, Amer. Council on Public Affairs, Washington, D. C., pp. 191-192.

The Rutland case. Legislation by the Board.

After the Ansley decision, we find that while such staunch friends of labor as the American Civil Liberties Union were specifically advocating legislation to "democratize the employees' organizations", organized labor itself and the Board, its most eminent and powerful protagonist, stubbornly refused to acknowledge the obvious necessity for changes in the Act.

Some years after the *Ansley* case, the Board abandoned the logical position there declared, and announced in its decision in *Rutland Court Owners, Inc.* (1942), 44 N.L.R.B. 587, the policy and argument which it has applied to the instant case, and in the case of *Local 2880, etc. v. N. L. R. B., supra.* This

policy and this argument were an obvious makeshift and an expedient adopted to avoid admitting the necessity of congressional intervention to remedy the chaotic condition created by disputes between the two great labor organizations.

The policy announced in the *Rutland* case was criticized and vigorously denounced as a usurpation of congressional power *in,* and outside, the Board. Board member Leiserson, dissenting in that case, said:

> "There is no contention in this proceeding that the closed-shop contract of 1939 is invalid. The discharges were made pursuant to the terms of that contract and are therefore within the terms of the proviso to Section 8(3) of the Act. To reach a contrary result the majority has in effect assumed authority to suspend enforcement of the provisions of a valid collective bargaining agreement although this Board has previously held that it was not permitted to do so. *If valid closed-shop contracts, which are expressly permitted by the Act, have undesirable effects, it is for the Congress, and not for the Board, to make the modifications.* I would dismiss the complaint."
>
> *Rutland Court Owners, supra,* at p. 603.

Outside the Board we find the following criticism of the *Rutland Court Owners* case:

> *"The Rutland Court Owners case would seem to be an act of legislation by the Board.* * * *
>
> The Board was, however, faced with the fact that the National Labor Relations Act expresses two policies which are at times inconsistent: (1) the policy that employees should have freedom in selecting, by majority vote, representatives for

collective bargaining; (2) the policy that closed shop agreement, if properly made, should be enforced by discharge of employees for failure to affiliate with the contracting union. The Rutland Court Owners case shows that the Board prefers to be guided by the first and not the second policy where the agreement is about to expire. * * *

The problem is one which, as Board Member Leiserson stated in the Rutland Court Owners case, requires Congressional action. * * *" (Italics ours.)

"Labor Disputes and Collective Bargaining", Teller, Cum. Supp., April, 1947, pp. 105-106.

The dilemma created by the Rutland case.

The Board's disastrous policy not only subjected the employer, who in good faith complied with the closed shop contract, to penalties in the form of back pay for discharged employees, but also to legal sanctions in the courts for failure to perform a contract, the performance of which the Board had forbidden. This employer's dilemma has been stated by Teller as follows:

"This result, on the other hand, might be embarrassing to the parties to the agreement, since enforcement of the agreement might be secured in a law court, thereby subjecting the parties to inconsistent orders." (*Labor Disputes and Collective Bargaining,* Cum. Supp., April, 1947, p. 106.)

An order such as was entered in this case presented to a California employer a very real problem.

We know from what appears in *Park & T. I. Corp. v. Int. etc. of Teamsters, supra,* that the public policy

of the state of California permits the coercion of employees by other employees or labor organizations. In addition in California such "coercive" contracts are valid and enforceable. Section 1126 of the California Labor Code expressly provides for the enforcement of closed shop contracts.

> "Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State."

Such contracts have been held valid and enforceable in the following California cases:

Levy v. Superior Court (1940), 15 Cal. (2d) 692, 104 Pac. (2d) 770;

Montalbo v. Hires Bottling Company (1943), 59 Cal. App. (2d) 642, 139 Pac. (2d) 666.

Since California permits the coercion of employees, it is very doubtful that its courts would hesitate to enforce a closed shop contract if the employer's sole defense should be an order of the Board based on the alleged malicious motivation of the contracting union. This for the reason that such coercion or malicious motivation, if directed at union members whose activities are considered by the contracting union inimical to its best interests, has the complete sanction of the California courts.

In *James v. Marinship Corporation* (1944), 25 Cal. (2d) 721, 155 Pac. (2d) 329, it was held that it is the

legal right of a union to expel from membership any person who has interests inimical to it or who may destroy it from within or who may refuse to abide by any reasonable regulation or lawful policy adopted by it. The Court said:

> "Defendants argue that a union should not be compelled to admit all persons to membership, because some of such persons may have interests inimical to the union and may destroy it from within. *The right of the union to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union* (*Brown v. Lehman* (1940), 141 Pa. Super. 467 (15 A. 2d 513), *supra;* see Rest. Torts, comment b to Sec. 810) *affords it an effective remedy against such persons.*" (Italics ours.)
>
> *James v. Marinship Corporation,* supra, 25 Cal. (2d) at p. 736, 155 Pac. (2d) at p. 338.

There is no question but that the discharged employees in the instant case were seeking to destroy the CIO from within, and therefore, under California law, the CIO was fully justified in expelling them. Under such circumstances the CIO's conduct would be neither malicious nor unlawful, and Petitioner would have no defense to interpose to any action brought by the CIO to compel the enforcement of the contract.

There is another principle of law in addition to those discussed above, which would require the Petitioner to comply with the provisions of the "closed shop" contract, even though it knew of the alleged intended purpose of the CIO to use the contract to violate the Act. This principle is that it is no defense

to the performance of the contract that the obligor knows that the agreement or its performance might aid the obligee to violate the law. The principle has been stated as follows:

"The law is clear and decisive on the question of the enforceability of a contract even though one of the parties thereto has knowledge of an intended purpose of the other party, by means of the contract, or the performance thereof, to violate some law or public policy of the state. The rule in that regard is thus stated in 53 A.L.R. 1364 at page 1366:

'The rule, according to the great weight of authority, is to the effect that a contract legal in itself is not rendered unenforceable by the mere fact that one of the parties thereto has knowledge of an intended purpose of the other party thereto, by means of the contract or subject-matter thereof, to violate some law or public policy of some state; or, as is stated in 6 R.C.L. p. 696, "where there is no moral turpitude in the making or in the performing of the contract, the mere fact that an agreement the consideration and performance of which are lawful incidentally assists one in evading a law or public policy, is no bar to its enforcement, and that, if the contract has been performed by the promisee, it is no defense that the promisor knew that the agreement or its performance might aid the promisee to violate the law or to defy the public policy of the state, when the promisor neither combined nor conspired with the promisee to accomplish that result, nor shared in the benefits of such a violation." ' "

People v. Brophy, 49 Cal. App. (2d) 15, at 30-31, 120 P. (2d) 946, at 954-955.

The application of the express provisions of the Wagner Act itself placed employers in many perplexing and insoluble situations, but this had to be accepted because it was the express desire and intent of Congress. On the other hand it appears to us unjustifiable to inflict further penalties on an employer on the basis of inferences and assumptions which appear to be entirely contrary to the express and declared intent of Congress, particularly when the sanctions thus imposed are aimed at a state of mind and at activity heretofore considered entirely legitimate. We need not, however, rest our case on this argument.

In enacting the "Labor Management Relations Act, 1947", Congress has again declared that the Wagner Act was not intended to prohibit the coercion of employees by unions.

The Wagner Act generally, and Section 8 in particular, have been radically amended by the Labor Management Relations Act, 1947. The changes wrought in the pertinent sections of the Wagner Act by these amendments cannot be validly described as "clarifications". Such amendments give rise to a presumption of change, not clarification.

> "* * * the amendment of the language in the particular noted signifies an intention to change the pre-existing law. In *United States v. Bashaw*, 50 Fed. 749, 754, it was said: 'The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act.'

'Where changes have been introduced by amendment, it is not to be assumed that they were without design; usually an intent to change the law is inferred.' (*In re Segregation of School District No. 58,* 34 Idaho, 222 (200 Pac. 138).) In *Rieger v. Harrington,* 102 Or. 603 (203 Pac. 576, 580), it was said: 'By amending that statute, the legislature demonstrated an intent to change the pre-existing law, and the presumption must be that it was intended to change the meaning of the statute in all the particulars wherein there is a material change in the language of the amended act.' "

People v. Weitzel (1927), 201 Cal. 116 at pp. 118-119, 255 Pac. 792 at 793.

The Board's position is that under the Wagner Act it had power to regulate labor unions by declaring them ineligible to be parties to a "closed shop" contract when the unions committed the unfair labor practice of coercing their members in the exercise of the rights guaranteed by Section 7 of said Act. The Board maintained that the Act so provided, and it follows that it would be unreasonable and unnecessary to "change" the Act for the purpose of inserting a provision which already existed therein. Section 8(b)(1) and (2) of the new Act provides in part as follows:

"(b) It shall be an *unfair labor practice for a labor organization or its agents*——

(1) *to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title*: * * *

(2) *to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section* or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *"

29 U.S.C.A., Sec. 158(b)(1)(2).

Here we have for the first time in express language a statutory prohibition against the coercion of employees by other employees or labor organizations. Was it necessary to make a "change" to express what already was law? It seems to us that to answer this in the affirmative would be to charge Congress with indulging in fruitless byplay.

The Conference Report of the House accompanying the adoption of the Labor Management Relations Act, 1947, furnishes ample proof of the fact that change, not clarification, was the desired objective. We find that the Act was to be "two-sided", no longer "one-sided".

"In amending section 1 of the National Labor Relations Act (the policy thereof) the House bill omitted from the present law all of the so-called findings of fact, some of which have been so severely criticized as being inaccurate and *entirely one-sided.* The Senate amendment rewrote the findings and policies contained in section 1 of the National Labor Relations Act so that those findings will not hereafter constitute

an indictment of all employers. At the same time the Senate amendment inserted in the findings of fact a paragraph to the effect that experience has demonstrated that certain practices by some labor organizations have the effect of burdening commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of commerce. The Senate amendment further declared the elimination of such practices to be a necessary condition to the assurance of the rights herein guaranteed. Thus under the Senate amendment the findings and policies of the amended National Labor Relations Act are to be *'two-sided.'* The conference agreement adopts the provisions of the Senate amendment in this respect." (Italics ours.)

H. R. Report No. 510, 80th Congress 1st Session.

We also find that Congress knew that under the old Act an employee was not free from being coerced into a union, and that the new Act changes the situation so that now he is free to remain unorganized.

"The *second change* made by the House bill in section 7 of the act (which is carried into the conference agreement) also has an important bearing on the kinds of concerted activities which are protected by section 7. That provision, as heretofore stated, provides that employees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so."

H. R. Report No. 510, 80th Congress 1st Session, pp. 39-40.

The report shows that in defining in the new Act, the unfair labor practices of unions, Congress was "adding" to the Act. We submit that there is no necessity for adding anything to a statute if it is already there.

> "Both the House bill and the Senate amendment amended section 8 of the National Labor Relations Act by *adding thereto unfair labor practices on the part of labor organizations.*" (Italics ours.)
>
> H. R. Report No. 510, 80th Congress 1st Session, p. 40.

Finally, on this phase of the question, we submit that the Board's premise has no support in the past or present history of the Act, and that the Board's contention in this case and in the case of *Local 2880, etc. v. N.L.R.B., supra,* cannot be upheld by the rule announced by the Supreme Court in *Wallace Corporation v. N.L.R.B.* (1944), 323 U. S. 248, 89 L. Ed. 216. This uncertain pronouncement of an extremely divided Supreme Court should be applied only in cases disclosing a similar state of facts, to-wit, cases where the employer willingly or otherwise collaborates with a union in a discriminatory scheme. Compliance with a valid "closed shop" contract is not the type of collaboration denounced by the *Wallace* case.

We submit in the light of the foregoing that the order entered herein by the Board was in excess of the powers vested in it by the Wagner Act, and that it therefore constitutes a deprivation of the property of the Petitioner and the CIO without due process of law.

2. EVEN IF IT BE ASSUMED THAT THE ACT DID PROHIBIT THE COERCION OF EMPLOYEES BY UNIONS, THE PETITIONER WAS NEVERTHELESS ENTITLED TO A DISMISSAL OF THE COMPLAINT BECAUSE THE RECORD FAILS TO DISCLOSE ANY EVIDENCE SHOWING THAT THE CIO DISCRIMINATED AGAINST EMPLOYEES BECAUSE OF THEIR ADVOCACY OF ANOTHER ORGANIZATION AS THE BARGAINING REPRESENTATIVE.

In this portion of our argument it assumed that the Board has the power to prevent unfair labor practices by unions and to prohibit the performance of a "closed shop" contract in order to achieve this objective. It is also assumed that it is an unfair labor practice for a union to secure, under the terms of a "closed shop" contract, the discharge of an employee *because* he engaged in activities designed to secure a change in bargaining representatives. It is further assumed that it is an unfair labor practice for an employer to discharge an employee, at the request of a union pursuant to the terms of a "closed shop" contract, if he knows that the discharge was requested *because* of activity designed to secure a change in bargaining representatives.

The discharge of the employees was requested because of a violation of the CIO policy against strikes and not because of activity for a new bargaining agent.

It is our position that the record shows that the discharge of the employees was not requested *because* of activity designed to secure a change in bargaining representatives, but *because* of a clear violation of the CIO's policy against wartime strikes.

The record establishes that all of the discharged employees participated in one way or another in a strike[14], and the Board admits this fact.

> "For the next few days most of the respondent's employees, *including all the complainants,* stayed away from work because of the 'continuous meetings', a stoppage which we find *constituted a strike.*" (Italics ours.) (Board's Decision, R. 72.)

The record also establishes that the CIO had pledged itself not to engage in any strike for the duration of the war[15], and that all the discharged employees knew that participation in this strike was contrary to this policy.

In addition, the record shows that on the day of the strike and before it began, the CIO distributed among the employees at Petitioner's plant a pamphlet warning that those who participated in this strike would lose standing in the union as well as their jobs.[16]

The record likewise establishes that the CIO suspended or expelled all of the discharged employees because they fomented or participated in a wartime strike,[17] and it is also a fact that some of them pleaded guilty to the charge of participating in or fomenting such a strike.[18]

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[14]R. 70; 71-72; 201-203; 258; 274; 296; 365-367; 404-405; 420-421; 506-507.
[15]R. 420-421.
[16]R. 257; 789-790.
[17]R. 741-742; 742-743; 856; 867.
[18]R. 506-507.

The Board's decision makes no finding contrary or in conflict with any of the facts above recited, but the Board does conclude that the employees were expelled because of activity designed to displace the CIO as bargaining representative. In so doing the Board confuses the motive with the (be) cause.

An act unlawful in itself is not converted by a malicious or bad motive into an unlawful act.

That the CIO had the right to discipline its members for participating in a strike called in violation of union policy, is, as the Trial Examiner states,[19] hardly open to question, and the Board does not in its decision deny that the CIO had the right to discipline its members for such a reason.

In view of the admitted facts, it must be conceded that the Board by its decision and order has erroneously, on the basis of the CIO's malicious motivation, denied the CIO the legal right to discipline its members and control its affairs.

We submit that there is absolutely no legal basis for this action of the Board. A state of mind is not a wrong for which the law gives redress, and it is the general rule that a rightful act is not rendered actionable as a wrong by virtue of the bad intent with which it is done.

> "A malicious motive or a mere intention to do wrong, not connected with the infringement of a legal right, cannot be made the subject of a civil action, for malice, of itself, as a state of mind,

[19] R. 63.

is not a wrong for which the law gives redress. It is only when words or acts are inspired or prompted by malice that comes within judicial cognizance. The intention to do a wrong must be coupled with the doing or accomplishment of the act intended. Accordingly, it may be laid down as a general rule that a rightful or legal act, or the exercise of a legal right, is not rendered actionable as a wrong to another by virtue of a bad intent with which it was done or the existence of a malicious motive that prompted it. In other words, whatever a man has a legal right to do he may do with impunity and without raising a cause of action against himself because of bad motives, if he exercises his legal right in a legal way, even though damage results to another."

1 *Am. Jur., Actions,* Sec. 25, pp. 420-421.

The Board itself has recognized the legal principle above set forth. In *National Linen Service Corp.* (1943), 48 N.L.R.B. 171, the Board recognized the difference between motive and cause in a case where it was conceded that the employer had intended to dismiss certain employees because of union activity. In so recognizing this principle and applying it, the Board approved the following findings of one of its Trial Examiners in the above cited case:

"On that day Thorne was paid off and has not again been employed by United at any of its branches or by any of the other branches of National. *From the foregoing it is found that although Thorne's name was on the list of employees to be dispensed with because of their*

union activities, when and as a suitable pretext could be found, the circumstances surrounding Thorne's discharge did not constitute a pretext but a normal and legitimate reason for refusing to continue him in the employ of United. In discharging Thorne, United did not engage in any unfair labor practice.

* * * * * * *

"Lyons testified that his anti-Semitism first came to the surface in about September 1940 and that it continued to increase from then until the United States entered the war. There is no evidence as to when this first came to Gordon's attention. With few exceptions, the management of National appears to be essentially Jewish. Bearing in mind that notorious anti-Semitism openly expressed among his fellow employees by one in the position occupied by Lyons may well be highly obnoxious to a Jewish employer, *it is found that, although Lyons was on the list of employees to be dispensed with at the first pretext because of their union activities,* nevertheless, his conduct, independent of his union activities, was obnoxious to the management of United and was of a character which justified his discharge regardless of his union affiliation, and that his union affiliations were not the motivating cause of his discharge. In discharging Lyons, United did not engage in any unfair labor practices." (Italics ours.)

National Linen Service Corp., supra, at pp. 204-205.

A labor union, it is submitted, should have the right, as other persons or associations, to preserve and pro-

tect itself from those who would destroy it from within. The Board's failure to apply legal principles without discrimination herein has resulted not only in unwarranted interference with the internal affairs of the CIO, but also in reviving a discredited defense to the enforcement of legal rights. The principle of this discredited defense as applied in this case, permits delinquent members of a union to immunize themselves from any discipline or punishment by merely manifesting their hostility to the bargaining agent before or after the commission of the offense. Applied generally, this discredited defense would permit defaulters to defeat all claims against them by merely contending that the obligee was actuated by malicious motives.

> "The proposition is clearly and forcibly stated in *Jenkins v. Fowler,* 24 Pa. St. 308, as follows: 'Malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful. When a creditor who has a just debt brings a suit or issues execution, though he does it out of pure enmity to the debtor, he is safe. In slander, if the defendant proves the words spoken to be true, his intention to injure the plaintiff by proclaiming his infamy will not defeat justification. One who prosecutes another for a crime need not show he was actuated by correct feelings, if he can prove that there was good reason to believe the charge was well founded. In short, any transaction which would be lawful if the parties were friends cannot be made the foundation of an action merely because they happen to be enemies. As long as a man

keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches hearts.' ''

Chambers v. Baldwin, 91 Ky. 121, 128, 15 S. W. 57, 59, 11 L.R.A. 545, 549, 34 Am. St. Rep. 165, 169.

It is, therefore, submitted that although it might be argued that there was evidence of "bad motive," there is certainly no evidence that the discharges were requested and obtained because of activity designed to effect a change in bargaining representatives, and for this reason Petitioner herein was entitled to the dismissal of the complaint.

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3. **EVEN IF IT BE ASSUMED THAT THE BOARD HAS POWER TO PREVENT THE COERCION OF EMPLOYEES BY LABOR ORGANIZATIONS AND THAT THE CIO SUSPENDED ITS MEMBERS BECAUSE OF THEIR ADVOCACY OF ANOTHER UNION, THE PETITIONER WAS ENTITLED TO A DISMISSAL OF THE COMPLAINT BECAUSE THERE IS NO EVIDENCE IN THE RECORD THAT THE PETITIONER HAD KNOWLEDGE OF THE CIO'S ALLEGED MALICIOUS MOTIVATION.**

The findings of the Board should be carefully scrutinized because they are in conflict with those of its Trial Examiner.

The Petitioner, under the policy enunciated by the Board in the *Rutland Court Owners* case, supra, is here charged with violating Section 8(1)(3) of the Wagner Act on a general finding by the Board that it had "knowledge" that the CIO suspended the employees because of activity designed to effect a change

in representatives. (R. 79.) On the other hand the Trial Examiner who presided at the hearing, found that Petitioner did not have such knowledge and recommended the dismissal of the complaint in its entirety. (R. 65; 67.) Under such circumstances we feel justified in calling the Court's attention to the rule that "while the report of the examiner is not binding on the Board, yet where it reaches a conclusion opposed to that of the examiner, * * * the report of the latter has a bearing on the question of substantial support and materially detracts therefrom."

A. E. Staley Mfg. Co. v. N.L.R.B. (1941; CCA 7th), 117 Fed. (2d) 868, at 878;

N.L.R.B. v. Superior Tanning Co. (1941; CCA 7th), 117 Fed. (2d) 881, at 890;

Wilson & Co. v. N.L.R.B. (1941; CCA 8th), 123 Fed. (2d) 411, at 418;

Wyman-Gordon Co. v. N.L.R.B. (1946; CCA 7th), 153 Fed. (2d) 480, at 482.

In presenting the question of the sufficiency of the evidence to sustain the findings of the Board, we do so knowing that it has the exclusive province of appraising the evidence and of drawing inferences from established facts, but we also know that in so doing it must observe certain fundamental standards. It is required to observe the traditional rule against the presumption of liability or bad faith; it must base its findings on substantial evidence—not mere scintilla, and the inferences it draws must be reason-

able inferences generated by facts—not surmise or speculation.

Boeing Airplane Co. v. N.L.R.B. (1944; CCA 10th) 140 Fed. (2d) 423, at 433.

We believe that what follows will show that the Board erred in finding contrary to the Trial Examiner, and that in its own findings it has not observed the fundamental standards above summarized.

The Board's findings that Petitioner had "knowledge" of its employees' anti-CIO activity when it discharged the first two groups of employees, are based on invalid and prohibited inferences and should be disregarded.

On July 30, 1945, the Petitioner discharged five employees who had been CIO stewards, and on July 31, 1945, it discharged four employees who acted as committeemen for the other employees opposing the CIO. The Board found that the Petitioner had "knowledge" of its employees' "anti-CIO" activity when it discharged these persons. These findings are based on invalid and prohibited inferences.

The term "anti-CIO", so often to be encountered herein, is indiscriminately used by the Board in its decision when qualifying or describing employee activity or purpose. This is an ambiguous term and it is seldom possible to determine from the context whether the Board has used it to describe, in relation to the CIO's right to discipline its members, permissible and innocent conduct, allegedly protected by Section 7 of the Act, or prohibited and punishable conduct not within the protection of the Act. There-

fore, to make clear the defects in the Board's findings, it is necessary to define or describe permissible and prohibited "anti-CIO" activity or purpose. Under the Board's announced policy in the *Rutland* case, *supra,* activity designed to secure a change in bargaining representatives is permissible "anti-CIO" activity, and is protected by the Act. Resignation or withdrawal from the CIO, *the Board admits,* would ordinarily entitle the Petitioner to discharge an employee in view of the "closed shop" contract, and is, therefore, prohibited anti-CIO activity not protected by the Act. (Board's Decision, R. 78, Footnote 8.) A strike violative of the CIO's rules and not authorized by it, is prohibited anti-CIO activity and is not protected by the Act. *(N.L.R.B. v. Draper Corporation* (1944; CCA 4th), 145 Fed. (2d) 199, at pp. 202-203.) Failure to perform the duties of office and the sabotage of policy adopted by majority vote is, on general principles, prohibited anti-CIO activity not protected by the Act.

With the foregoing definitions in mind, we will first discuss the finding involving the discharges made on July 30, 1945.

The record shows that a meeting was called for July 30, 1945, and that the notices announcing it were posted in Petitioner's plant on July 28, 1945. (R. 192; 213.)

The meeting was called for a dual purpose. One was to foment activity designed to secure the selection of a new bargaining representative, and was therefore

permissible anti-CIO activity. The other was to induce the employees to withdraw from the CIO and was therefore prohibited anti-CIO activity. (R. 189-190; 260-261; 286-287; 408-409.)

In the early afternoon of the day of the meeting the five stewards were suspended and dismissed. (R. 667; 523-525; 538-539.) Nothing was said or done at that time which could have informed the Petitioner as to the reason for the suspension by the CIO of these five men. The Board, however, in order to bring home to Petitioner guilty knowledge of the CIO's motivation, and of the stewards' permissible anti-CIO activity, draws certain invalid inferences from the fact that a "lay-off" of two hours for the meeting was requested and granted. (R. 268-269.) The record shows that the persons who requested the lay-off said nothing which would have informed the Petitioner as to either of the purposes of the meeting. Accordingly the Board was forced to draw its inferences as follows:

> "*The respondent must have learned of the (permissible anti-CIO) purpose of the meeting,* or it would not have agreed to shut down the plant for about two hours so that the employees could attend." (R. 69-70.) (Italics and parenthetic insertion ours.)

On the basis of this finding, the Board concludes that,

> "before the discharge of the stewards the respondent must have learned of their (permissible) *anti-CIO activity,* for it is unreasonable to suppose that it would have agreed to the request

made by one of them to shut down operations to enable working employees to attend a meeting the stewards planned to hold *without ascertaining the reason of* the meeting." (Italics and parenthetic insertion ours.) (R. 77.)

The Court will note how the Board has clandestinely introduced in both its premise and its conclusion the silent assumption that Petitioner must have learned the "true" or permissible purpose of the meeting and must have ascertained the "true" or permissible reason for the meeting. We submit that this is a perfect example of fallacious reasoning.

The Board first postulates on its *ipse dixit* that employers never grant time for meetings unless they ascertain the purpose of the meeting. Satisfied with this premise the Board infers therefrom that Petitioner must have ascertained or been given a reason for the meeting. Having gone this far the Board then resorts to the much condemned practice of drawing one inference upon another, and deduces from the first the further inference that Petitioner must have learned the "true" or permissible anti-CIO purpose of the meeting when it ascertained or was given a reason therefor. It is the rule that findings reached in this fashion are not supported by substantial evidence.

N.L.R.B. v. Pick Mfg. Co. (1944; C.C.A. 7th; 135 Fed. (2d) 329, at 333.)

The foregoing demonstrates that the Board has failed to prove that employers in general, and Peti-

tioner in particular, invariably ascertain the "true" purpose of meetings for which they grant time. But there is an even stronger reason against the propriety of basing this finding on an inference. Two of the discharged employees, one the steward who requested the lay-off and another who accompanied him on this mission, were both Board witnesses at the hearing. Other witnesses at the hearing who also had knowledge of this matter were Mr. Altman, Petitioner's plant superintendent, the person who granted the request for time off, and Mr. Carter and Mr. Stansbury, his assistants, who were present in his office at the time. (R. 268-269.) There were, therefore, at least five persons from whom the Board's counsel could have elicited direct testimony, had he so desired, as to whether Petitioner was told or ascertained the permissible anti-CIO purpose of the meeting. Under such circumstances the Board cannot rely on inferences or on its "expertness" to sustain this finding. When direct evidence as to a fact is available, the party having the burden of proof may not rely on inferences.

> *"Inference is capable of bridging many gaps. But not, in these circumstances, one so wide and deep as this.* * * *
>
> "No favorable inference can be drawn from the omission. It was not one of oversight or inability to secure proof. That is shown by the thoroughness with which the record was prepared for all other periods, before and after this one, and by the fact petitioner's wife, though she married him during the period and was available, did not tes-

tify. The only reasonable conclusion is that petitioner, or those who acted for him, deliberately chose, for reasons no doubt considered sufficient (and which we do not criticize, since such matters, including tactical ones, are for the judgment of counsel) to present *no evidence or perhaps to withhold evidence* readily available concerning this long interval, *and to trust to the genius of expert medical inference and judicial laxity to bridge this canyon.*

"In the circumstances exhibited, the former is not equal to the feat, and the latter will not permit it. No case has been cited and none has been found in which inference, however expert, has been permitted to make so broad a leap and take the place of evidence which, according to all reason, must have been at hand. To allow this would permit the substitution of inference, tenuous at best, not merely for evidence absent because impossible or difficult to secure, but for evidence disclosed to be available and not produced. *This would substitute speculation for proof."*

Galloway v. U. S. (1943), 319 U. S. 372, at 386-387, 87 L. Ed. 1458, at 1468-1469.

In addition to the logical obstacles and the rules of evidence which render the Board's finding invalid, there are other matters which militate against it.

First, it is the uncontradicted fact that the meeting had a dual purpose, one which was proper and the other prohibited. Assuming, therefore, that Petitioner did ascertain the dual purpose or reason for

the meeting, the question is what power did it have to compel a disclosure with respect to the state of mind and the internal affairs of the CIO which would enable it to ascertain whether the discharges were requested because of permissible or because of prohibited activity? It must be conceded that Petitioner did not have the power to compel disclosure of this information. In addition, the Petitioner did not possess the "expertness" of the Board and was not privileged, as was the Board, to draw "either of two inconsistent inferences from the evidence" and to base a finding on the one so selected.[20] Under such circumstances we submit that Petitioner was entitled to presume that in this transaction the CIO was acting in fairness and in honesty and that it was suspending the men because of prohibited activity. If Petitioner were to have been compelled to take on the attribute of a judge, a function which the Board has in fact cast upon it (R. 79), it would have been forced to find that the evidence before it did not establish the illegal motivation of the CIO because it gave support both to the contention that the CIO acted in good faith and to the contention that it did not.[21]

Second, the representatives of the Petitioner when requested to give time for the holding of the meeting, could not have made inquiry with respect to any union activities which were to be discussed thereat except at

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[20] *N.L.R.B. v. Nevada Consol. Copper Corp.* (1942), 316 U.S. 105, at 106-107, 86 L. Ed. 1302, at 1307.

[21] *Pennsylvania R. Co. v. Chamberlain* (1932), 288 U.S. 333, at 339-340; 77 L. Ed. 819, at 823; *Gunning v. Cooley*, 281 U.S. 90, at 94-95; 74 L. Ed. 720, at 724-725.

the risk of being charged with unfair labor practices violative of the Wagner Act. The Board has consistently held that the questioning of workers by executives or supervisory employees concerning union activities constitutes interference or coercion violative of Section 8(1).

Biles Coleman Lbr. Co. (1937), 4 N.L.R.B. 679;
Cover Fork Coal Co. (1937), 4 N.L.R.B. 202;
Crow Coal Co. (1938), 9 N.L.R.B. 1149.

Since it must be presumed that Petitioner's representatives acted in good faith and did not violate the Act, the conclusion must be that they did not question the employees as to the nature of the union matters to be taken up or discussed at the meeting. (*Commentaries on the Law of Evidence, Jones,* 1913, Vol. 1, Sec. 13, pp. 98-100.) This being so, Petitioner's representatives could have gone as far as asking the steward and his companion the purpose of the meeting, and if the answer had been that it was for union activity, this would have limited the extent of their questioning, as under the rule above recited any further inquiry would have resulted in an unfair labor practice.

Third, the finding of the Board, even though the other objections against it were not sufficient, is entirely inconsistent with the facts. It must be remembered that the Petitioner herein stands charged with and has been found guilty of discharging the employees because of their activity against the CIO and in favor of the AFL. If as charged and found it was the intent of Petitioner to assist the CIO and to dis-

courage membership in the AFL, it is hardly reasonable to suppose that, knowing that the meeting was for the purpose of fomenting opposition to the CIO, Petitioner would have consented thereto. We submit that it is illogical to maintain that the Petitioner was both for and against the CIO.

In view of the foregoing, it is submitted that the Board's finding that the Petitioner knew of the permissible or other anti-CIO purpose of the meeting and the anti-CIO activity of the stewards when their discharge was requested, cannot stand. This being so, it follows that the further finding that the Petitioner had guilty knowledge of the CIO's alleged illegal motivation when it acceded to the discharge of these five persons, also cannot stand. Therefore, it must be concluded that in this instance the Board erred when it found that the Petitioner illegally assisted the CIO.

The finding on the discharge of the four committeemen suffers from the same infirmities as does the one made with respect to the stewards.

After the discharge of the stewards the meeting was held as scheduled, and those attending the meeting appointed four of their number to act as a committee to secure a reinstatement of the stewards and adopted a resolution to go on strike in event the stewards were not reinstated. (R. 196; 848-850.) At this meeting authority was given to send telegrams to the CIO and to the Petitioner giving notice of withdrawal or resignation of those present from the CIO. (R. 469-470; 786.) The foregoing establishes two acts constituting prohibited conduct not protected by the Act.

On the morning of July 31, 1945, the committee of four, armed with the authority conferred upon them by other employees, called at the plant and demanded that the five stewards be put back to work immediately, stating that otherwise "they wouldn't be responsible for the consequences." (R. 525-526.) This request for reinstatement was denied. The Board's version as to what occurred thereafter and its findings thereon are as follows:

> "On the morning of July 31, 1945, the negotiating committee went to the respondent's office and interviewed Superintendent Altman and Vice President Railey in an attempt to get the discharged stewards reinstated, at the same time advising the respondent of the anti-CIO telegram (prohibited conduct), which arrived during the interview. *After the anti-CIO purpose of the interview had become plain,* Heide, a CIO vice president, who was present, stated before Altman and Railey, admittedly management representatives, that the suspension notices of three of the four members of the negotiating committee were in the mail, asked the name of the fourth member, and upon learning that it was Olsen stated that he too would receive a suspension notice. Thus the respondent was in effect *again informed that the CIO's motive was to remove the opposition.* (R. 71.) (Italics and parenthetic insertion ours.)
>
> * * * * * * *
>
> Before the discharge of the committeemen at the termination of the strike on August 3, 1945, however, the respondent learned of the CIO's plan to use its closed-shop contract to remove its opponents, for when CIO Vice President Heide dis-

covered the anti-CIO activity of the committeemen, he baldly told two management representatives, Vice President Railey and Superintendent Altman, that the committeemen were thereupon being suspended." (R. 77.)

The Court will note in connection with the foregoing finding that the Board has again with the use of its ambiguous term "anti-CIO" activity, introduced therein the tacit assumption that the interview disclosed that the stewards and the committeemen were engaged *solely and exclusively* in activity designed to effect a change of representatives, and that is not the fact.

The "anti-CIO" telegram was evidence of withdrawal from the CIO, and according to the Board's own doctrine prohibited conduct not protected by the Act. The employees' charge that the CIO had failed to obtain increases in wages is indicative of dissatisfaction with the CIO, but it is not by any stretch of the imagination a statement of activity on behalf of another organization. The CIO's statement respecting the wartime freeze in wages and their right to discipline their members and to "keep them working" may be a defense or an explanation of its position, but it is certainly not indicative of a purpose to use the "closed shop" contract to discourage activity on behalf of another labor organization. (R. 527-528; 545.)

The right of the CIO to discipline its members and "to try to keep them workng" must be evaluated in the light of its pledge not to engage in strikes, and of

the undisputed fact that the employees involved were committed to a strike in the event the stewards were not reinstated. It is submitted, therefore, that the Board's assumption is not only invalid, but is also, in effect, a misstatement of the record, and that the conclusion must be that Petitioner did not at this time or before receive any information regarding the CIO's alleged illegal motivation.

Also illustrative of the Board's attempt to bolster its decision by the use of false assumptions is its laconic mis-description of the pamphlet distributed the same day by the CIO. Although it was a warning against participating in an unauthorized strike (R. 789-790), the Board by omission of facts has translated it into a warning to those who would assist the "CIO traitors." (R. 71.) Findings reached in this manner will not be accepted.

> "* * * the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence."
>
> *N.L.R.B. v. Union Pacific Stages, Inc.* (1938) (C.C.A. 9th), 99 Fed. (2d) 153, at 177.

The finding that on August 15, 1945, Petitioner obtained knowledge that the CIO was threatening employees "with discharge" for AFL activity is not supported by the record.

The following finding appears in the Board's decision:

> "On August 15, 1945, according to the uncontradicted and credited testimony of employee Zulaica, he reported to Production Manager Stanberry, admittedly a management representa-

> tive, that C.I.O. representatives were threatening him in the plant with discharge for wearing an A. F. of L. button. Stanberry admitted at the hearing that it was reported to him that C.I.O. adherents were 'threatening the men' with discharge under the closed-shop contract for wearing A. F. of L. buttons." (R. 73.)

We maintain that the foregoing findings of the Board have no substantial support in the record and depend entirely for their validity on prohibited inferences.

We have set forth all the testimony bearing thereon, in order not to encumber this portion of the brief, in the appendix at pages i-v.

In the light of the record we submit that nothing having the dignity of an inference could be drawn therefrom to show that on August 15, 1945, the management of Petitioner received knowledge of a CIO threat to discharge the men under the terms of the "closed shop" contract for AFL activity. If on the other hand it should be argued that an inference could be drawn to this effect, we point out that both Mr. Zulaica and Mr. Stanberry were witnesses at the hearing and that by proper questioning either one or the other, if it was the fact, could have testified directly that such a threat had been made *and that it was in fact communicated to a representative of petitioner's management.* When direct evidence as to a fact is available, the party having the burden of proof may not rely on inference to establish it.

Galloway v. U. S., 319 U. S. 373, 87 L. Ed. 1458, *supra.*

The Board's finding that on August 17, 1945, Petitioner was clearly apprised of the nature of the CIO's motivation by the charges of discrimination filed with the Board, is contrary to the record.

The following finding appears in the Board's decision:

> "On August 13, 1945, the A. F. of L. verified and thereafter duly filed the original unfair labor practice charge herein, alleging the discriminatory discharge of the five stewards and the four committeemen.
>
> * * * * * * *
>
> Moreover, the respondent, when it refused the reinstatement application of these two groups of discharged employees on August 17, 1945, was clearly apprised of the nature of the dismissals by the formal charges of discrimination which the A. F. of L. had filed with the Board." (R. 72-73, 77-78.)

This finding is entirely contrary to the record. The pertinent portion of the charge filed by the AFL read as follows:

> "Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that Colgate-Palmolive-Peet * * * is engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (3) of said Act, in that on or about the dates hereinafter specified, it, * * * terminated the employment of:
>
> Edwin H. Thompson .....July 30, 1945
> Lincoln F. Olsen ..... " " "
> William Sherman ..... " " "
> David Luchsinger ..... " " "
> Harold L. Lonnberg ..... " " "

Frank Marshall .....July 31, 1945
Harry Smith ..... " " "
Clyde Haynes ..... " " "
Sanford Moreau ..... " " "

because of their refusal to adhere to policies of Warehouse Union Local 1-6 ILWU, a labor organization, * * *.

International Chemical Workers
Union, A.F.L.,
By /s/ Harvey E. Howard,
1440 Broadway, Oakland, Calif. HI-5922.

Subscribed and sworn to before me this 13th day of August, 1945, at San Francisco, California.

/s/ Merle D. Vincent, Jr.,
Field Examiner.

Date filed August 14, 1945." (Italics ours.) (R. 92-93.)

We submit that the foregoing not only establishes the falsity of the Board's finding, but also constitutes an admission on the part of these men and the AFL that they were not discharged for activity on behalf of the AFL but "because of their refusal to adhere to policies of" the CIO. We know that the petitioner knew by this time that all of these men had violated at least one of these policies and that some of them were accused of failing to fulfill their duties of office and of failing to enforce the CIO's policy against racial discrimination. Under such circumstances, how can it be said that petitioner knew that the discharges had been requested to discourage the exercise of rights guaranteed by Section 7 of the Act?

The Board's finding that on August 31, 1945, the Petitioner was again informed of a CIO threat to discharge employees is not supported by the record.

The Board in its decision made the folowing finding:

> "On August 31, 1945, a C.I.O. representative told employee Norris that she was discharged for transferring from the C.I.O. to the A. F. of L. She reported the conversation to Production Manager Stanberry, who merely replied, 'He can't do that.' " (R. 74.)

The foregoing finding depends for its validity on the assumption that the employee, Norris, in reporting the conversation to Stanberry, also reported that she had been discharged "for transferring from the C.I.O. to the A. F. of L.". Mrs. Norris' testimony clearly shows that she made no such report to Stanberry. Here is what she said:

> "Q. (By Mr. Royster): Now, what was your conversation with Mr. Gleichman on this occasion, Mrs. Norris?
>
> A. I saw Mr. Gleichman coming. My machine was broken down, so I walked over to talk to one of the grls because he made it so tough for me the day before that I didn't want to get into an argument with him. Well, he followed me. He asked me if I had changed my mind, that he gave me time to go home and think it over, that I would drop A. F. of L. and stick by CIO. I told him 'No,' that I hadn't changed my mind. He said, 'I held a letter out for you until today.' He says, 'You are fired. You might as well get off the floor right now,' and I got off.

I walked over to Don Stanberry, the Superintendent, and I said I didn't see why I should be treated that way, that I didn't do anything.

Q. Well now, just a minute.

Just what did you tell Don Stanberry?

A. I said, 'That union fellow kicked me off the floor. He told me I was fired,' and he shook his head and he said, 'He can't do that.'

So I said, 'Well, I am going down to see Mr. Altman and find out if he can kick me off the floor.'

I went downstairs, to the office, and Mr. Altman was not there, but Mrs. Olys was there.

Q. That is O-l-y-s.

A. I don't know how she spells her name.

Trial Examiner Ruckel: Who is she?

A. She was at the time the timekeeper.

Q. (By Mr. Royster): And after a conversation with Mrs. Olys what did you do?

A. She walked out on the platform with me, and she sad, 'Don't cry, Kay. You go right back up to your job,' and I did." (R. 484-485.)

In connection with the foregoing it must be observed that Mrs. Norris had participated in the strike and that petitioner's representatives were entitled to infer that the threat to obtain her discharge would follow from this activity.

The Board's finding that the Petitioner discharged twenty-eight employees for permissible AFL activity is not sustained by the record.

The Board found as follows:

"Between August 31 and September 13, 1945, the respondent invoked the closed-shop contract

> at the C.I.O.'s request and discharged the remaining 28 complainants, including Zulaica and Norris, referred to above. In its brief before the Trial Examiner the respondent admitted knowledge by this time of the A. F. of L. activity of many of its employees, including by inference the aforesaid group of 28 complainants." (R. 74-75.)

This finding, like so many others, depends for its validity on the tacit assumption that the twenty-eight employees involved had engaged *solely and exclusively* in permissible AFL activity designed to effect a change in bargaining representatives. We know, and the petitioner knew, that they all had participated in the strike, and, as it later developed, about half of them pleaded guilty to having taken part in this prohibited activity. The record also discloses that it was stipulated at the hearing, as we have shown elsewhere, that the majority of them had authorized the sending of the telegrams giving notice of withdrawal from the CIO. In connection with this finding, the Board makes much of the fact that the petitioner's Labor Relations Director, Wood, refused to accede to an "unofficial" request for the discharge of a large number of employees. (R. 73-74.) It is the Board's position that this "unofficial" request for discharge "must have furnished the respondent further evidence that the CIO was using its closed-shop contract as a means for removing its opponents among the employees". It could also be validly inferred from the facts that the CIO desired to discipline its members for this and other prohibited activities. It must be remembered

that the CIO, prior to this incident, had conducted a mass checking of dues books (R. 709-712), and that the CIO representative who made the unofficial request for discharges stated to Mr. Wood that some of the persons involved were in bad standing, had not paid their dues or were not members of the CIO. (R. 729.) Frankly, we can see nothing sinister in Mr. Wood's efforts to prevent the discharge of a large number of petitioner's employees. There is nothing in this from which it could be reasonably inferred that Mr. Wood felt that he was at liberty to comply or not to comply with the contract as he saw fit. As a matter of fact, when Mr. Wood was officially advised by the CIO to release these persons, he complied. We submit that nothing can be made of Mr. Wood's efforts to mitigate the legal consequences which resulted from the performance of the closed-shop contract.

The Board's conclusionary finding that Petitioner made no bona fide effort to evaluate the evidence is based on an invalid presumption, disregards a valid presumption and is contrary to the record.

If the distinction between "permissible" and "prohibited" anti-CIO activities is observed in appraising the findings of the Board, we find that the petitioner had before it, except for the occasion when the five stewards were discharged, a set of facts which indicate permissible activities for and on behalf of the Welfare Association and the AFL as well as prohibited conduct not protected by the Act directed against the CIO. Such a situation would ordinarily bring into play the principle that malicious motives

do not render rightful conduct actionable as a wrong. Here the employees' prohibited conduct, independent of their permissible union activities, was of a character which justified their discharge, even under the Board's own understanding of the law. (*National Linen Service Corp.* (1943) 48 N.L.R.B. 171, supra, at pp. 204-205.) Accordingly, the Board, for the purpose of giving support to its order has made the conclusionary finding that "petitioner made no 'bona fide' effort to evaluate all the evidence before it when it allegedly decided, despite the CIO's failure to deny the obvious facts, to believe that the CIO was not acting in reprisal against the complainants because of their anti-CIO activity." (R. 79.)

This finding, like all others, depends for its validity on the assumption that the "anti-CIO" activity of the employees was wholly permissible and on the following factors:

(a) *The presumption that Petitioner knew that under the Act it was its duty to evaluate the evidence.* Unless this presumption is postulated, the Petitioner cannot be charged with failing to "make a bona fide effort to evaluate the evidence". There is implicit in this a charge of "bad faith" based on the presumption that Petitioner knew the law, or the Board's view of the law.

(b) *Rejection of the uncontradicted testimony of Petitioner's representatives with respect to their inability to determine the true motives or reasons of the CIO.* This rejection of uncontradicted testimony re-

quires that the presumption that Petitioner's officers acted in good faith be disregarded. This presumption cannot be disregarded because the testimony of Petitioner's officers was not impeached, is not inherently improbable, and bad faith cannot be attributed to them on the basis of the invalid presumption that they had knowledge of the Board's view of the law.

(a) The finding that the Petitioner made no effort to evaluate the evidence before it is invalid because it is based on the equally invalid presumption that the Petitioner knew of the Board's view of the law.

It will be noted that in its decision in this matter, the Board announced for the first time that in cases of this type the Petitioner must make a bona fide effort to evaluate the evidence before it, relative to the Union motive in demanding an employee's discharge. ("Guide to National Labor Relations Act", Tucker, page 226 (1947) Commerce Clearing House, Inc.) Prior to that time, and only after overruling its decision in the *Ansley* case, *supra* (18 N.L.R.B. 1029), the Board had held that under the Act, if the employer had knowledge that the discharge was requested because of permissible Union activity, the Act was violated. But it had not placed on the employer an affirmative duty of evaluating or weighing the evidence. As a matter of fact, the Board had refused, up to the time of its decision herein, to pass upon the contention that the employer "had a duty to inquire concerning the reason" for the discharge of an employee. *(Diamond T Motor Company* (1945), 64 N.L.R.B. 1225-1226.) There is no presumption that

Petitioner had knowledge of these decisions of the Board[23], and even if it could be shown that it had actual knowledge thereof, there was nothing in them which would have informed the Petitioner of the affirmative duty which the Board has imposed upon it. The Board's Trial Examiner, who presided at the hearing of this case, and who is to be presumed to have had some knowledge of the law and the decisions of the Board, did not think that any such duty rested on the Petitioner. In his intermediate report, he stated:

> "Assuming, for the moment, that the respondent believed that both factors prompted the C.I.O.'s request, the undersigned knows of no feasible method by which the respondent could determine which factor was the motivating one in the C.I.O.'s decision to invoke the closed-shop provision of the contract." (R. 59.)

In a footnote appended to the foregoing quotation, he said:

> "Or is the presence of an illegitimate motive alongside a legitimate one, sufficient, as the Board has frequently ruled where discharges absent a closed shop are concerned, to render a discharge violative of the Act? The undersigned does not believe that it is." (R. 59.)

And he concluded on the basis of a case theretofore decided by the Board, as follows:

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[23] "Litigants are not bound to take notice of executive decisions on legal questions." *Todd v. S.E.C.* (1943; CCA 6th), 137 F. (2d) 475, at p. 479.

"Here, again, as in the case of the stewards and the committeemen, *the respondent was under no duty to investigate to ascertain the real motive of the C.I.O. where there was evidence that conflicting motives existed.* As the Board said in the Diamond T case:

> While the respondent knew of the activities of these employees on behalf of the Union during the pendency of a question concerning representation, it does not follow that the Independent was motivated by such activities and not by lawful considerations in demanding their discharge.

In the Diamond T case, the respondent did not have knowledge of any activity by the employees in question which might have prompted a demand for their discharge, other than their activity on behalf of the rival union. In the instant case, the respondent had knowledge of at least two other facts, one, participation by the employees in an unauthorized strike, and the other, the announcement of their withdrawal of union membership—*either of which furnished a lawful basis for suspension by the Union.*" (Italics ours.) (R. 62.)

It is submitted, therefore, that for Petitioner to have known that it was required to weigh and evaluate evidence it would have to be presumed that its officers were endowed with an acuteness and a knowledge of the law not ordinarily possessed by judges and lawyers and seldom, if ever, attributed to laymen. In proof of this, we need only offer the irreconcilable conflict existing between this Circuit and the

7th Circuit on the basic question of law herein involved.

Since it is patent that the Petitioner could not have had actual knowledge of the law as viewed by the Board, it is apparent that the charge of bad faith or lack of good faith in evaluating or weighing the evidence must rest on the presumption that petitioner knew the law. However, the Board may not rely on the presumption that all persons are deemed to know the law in order to establish bad faith or lack of good faith on the part of Petitioner. The general rule which prohibits the Board from relying on this presumption has been stated as follows:

> "A knowledge of law will not be presumed in order to charge a party with bad faith, nor is there, on the question whether or not one has acted corruptly, a conclusive presumption that he knows the law." (31 C.J.S. Evidence, Sec. 173, p. 760.)

There is also no presumption that anyone knows how the Courts, much less administrative tribunals, will construe law. The rule in this respect has been stated as follows:

> "Persons are not presumed to know how the Courts will construe the law * * *." (31 C.J.S. Evidence, Sec. 132, p. 760.)

It is definitely established, therefore, that the Board cannot rely on any such presumption to attribute bad faith to Petitioner. It is also well to note that the difference in view which existed between Petitioner's counsel and the Board is evidenced by the record and

furnishes ample proof of the fact that Petitioner acted in good faith after being advised by its said counsel of what its duties were under the Act. The record discloses the following with respect to this matter:

"Q. Not at that time. Did you and Mr. Railey do anything about getting legal counsel in connection with the interpretation of your collective bargaining agreement with the ILWU?

A. Yes, sir.

Mr. Rowell. Well, Mr. Examiner, that is a similar inquiry that I tried one time.

Mr. Hecht. That state of mind of these persons, Mr. Examiner.

Mr. Edises. A question of good faith enters in here, Mr. Examiner.

Trial Examiner Ruckel. He may answer.

A. Yes, we did.

Q. (By Mr. Hecht). And what is it you did?

A. Well, when I returned Mr. Railey showed me a letter from Clark & Heafey.

Q. What are they?

A. Attorneys. They had been our regular attorneys in Oakland. In which they advised that——

Q. (By Mr. Hecht). And did you act in accordance with that advice?

A. We did.

Q. Directing your attention to Section 3 of the contract, were you advised that you had to comply with the terms of that Section 3 strictly?

A. We were.

Q. Were you further advised that you could not set yourselves up to judge the justice of putting these men in bad standing?

A. We were.
Q. And you acted accordingly?
A. We did so." (R. 726-727.)

The foregoing proves beyond doubt Petitioner's motive was entirely innocent when it failed to weigh or evaluate the conflicting evidence before it.

> "The maxim that ignorance of the law excuses no one is not so broad in its application that a mistake of law cannot be shown in evidence for the purpose of ascertaining the state of one's mind or one's motive."
>
> *Schott v. Dosh* (1896), 49 Nebr. 187, 196, 197, 68 N. W. 346, 350, 59 Am. St. Rep. 531, at p. 538.

It is submitted, therefore, that the Board has not only relied on an invalid presumption to charge the petitioner with bad faith but also has disregarded evidence in the record which establishes beyond doubt that its motives were innocent.

(b) The Board cannot sustain its finding by rejecting the uncontradicted testimony of Petitioner's officers respecting their inability to ascertain the true motives of the reasons of the CIO.

We submit that there is nothing in the record which shows that the testimony of Petitioner's officers respecting their inability to ascertain the true motivation of the CIO is inherently improbable or has been impeached. We also submit that the Board has pointed to nothing which indicates impeachment or improbability, except for its conclusionary finding of lack of good faith which is, as we know, based on an

invalid presumption. Nevertheless, the Board, in its decision, states:

> "Unlike the Trial Examiner, we do not view the conclusionary testimony by various representatives of the respondent, to the effect that the respondent did not 'know' that this was the C.I.O.'s motive, as establishing the respondent's lack of knowledge of such motive." (R. 76.)

In failing to credit this testimony, the Board is in fact presuming the liability and the bad faith of these persons, or it has, at best, chosen to draw from facts equally susceptible of a contrary inference, the inference that the Petitioner's officers were acting in bad faith. Basically the fact is that the Board has found the Petitioner guilty of bad faith and not worthy of belief because its officers were unfortunate enough to arrive at conclusions different from those of the Board. If the reasoning of the Board were valid, all first instance tribunals could be stigmatized as being not in good faith whenever Appellate Courts have differed with them as to the conclusions that may be drawn from a given set of facts. If this were true, the Board's own position would be unenviable. We contend in view of the Board's erroneous premise that there is nothing in the record justifying its rejection of this testimony. We also contend that under well established rules of law, the Board should have accepted this uncontradicted testimony and found that the Petitioner did not know the true reasons motivating the CIO.

It is clear that in the absence of impeachment or inherent improbability that the trier of the facts

may not indulge in an inference when the inference is rebutted by clear, positive and uncontradicted evidence. (*Hicks v. Reis* (1943), 21 Cal. (2d) 654, 660, 661, 134 Pac. (2d) 788, 791.) The testimony of Petitioner's officers was that due to the many legal causes which the CIO had for suspending its members, it could not ascertain whether it was actuated by proper or improper motives. We submit that this testimony was clear, positive and uncontradicted and that it may not be rejected in favor of an invalid inference having its origin on a prohibited presumption.

In addition, the Board never overcame the presumption of good faith and fair dealing which accompanied Petitioner through every stage of this proceeding.

> "For, if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, *it is the express duty of court or jury to draw the inference favorable to fair dealing.*" (Italics ours.) (*Ryder v. Bamberger* (1916), 172 Cal. 791, pp. 799-800, 158 Pac. 753, 756; see also *U. S. v. Calif. Midway Oil Co.* (1919), 259 Fed. 343, pp. 352, 353.)

The findings of the Board as to the CIO's alleged illegal motivation must be rejected because the record discloses that the CIO had a compelling and valid reason for requesting a discharge of its delinquent members.

We offer in support of our argument on this phase of the case, the comments of the Trial Examiner on the conduct of the CIO and its delinquent members.

We believe that they reflect the only valid and the only reasonable conclusions which an unbiased appraisal of the uncontradicted facts could achieve.

> "It may be reasonably argued that the respondent's knowledge was immaterial in the case of the stewards, and that the Union would be justified in expelling and the respondent in discharging them even though their 'bad standing' in the C.I.O. was founded on dual unionism alone. This view takes cognizance of the difference in the degree in loyalty owed by a functionary of a union and a rank and file member, and the strategic position which a steward or an officer occupies in the administration of a union. *As has been found, the stewards here were charged and found guilty eventually by the C.I.O. of sabotaging the policies of the international organization.* It may well be that if a steward or other functionary of a labor organization seeks to supplant that organization with a competing labor organization, he should first resign his office, and that if he does not, but engages in dual unionism, the first union may expel him even though by so doing it places him in the line of discharge by the employer." (R. 55-56; italics ours.)

> "That the contracting union might properly discipline members for participating in a strike called in violation of union policy, by suspending or expelling them, seems to the undersigned hardly open to question. A labor organization, no less than any other organization, cannot be denied the authority to compel compliance with the decisions of its membership. 'Good standing' in an organization implies something more than the mere payment of dues." (R. 63.)

With this view of the facts in mind, the following taken from *Wyman-Gordon Co. v. N.L.R.B.* (1946, CCA 7th), 153 Fed. (2d) 480, p. 489, is entirely applicable in judging the CIO's conduct:

> "We think it is unnecessary to discuss further the circumstances connected with the discharge of Coale and Crince. They have all been considered and we are unable to agree that there is any substantial basis for the conclusion that they were discriminatorily discharged. *It is almost inconceivable to think that petitioner in order to rid itself of these admitted troublemakers* (and this includes Baker) *would have resorted to a violation of the Act when it had numerous justifiable reasons for their discharge.* The record overwhelmingly discloses, with no evidence of any probative value to the contrary, that the discharge of Baker, Coale and Crince was not only justified but required." (Italics ours.)

It is evident that the activity of the discharged employees could have resulted in something more than just the loss of bargaining rights at petitioner's plant in so far as the CIO was concerned. It could have resulted in the sabotaging of policies valued by the majority of its members with the consequent loss of morale and authority, which if allowed to go unchecked could have developed in the total destruction of the Union.

In view of these compelling circumstances, it must be conceded that the Board's findings are acceptable only if it is held that when a partisan of the AFL was discharged, the fact of his partisanship raises a pre-

sumption that the ground assigned for his discharge was a false one. That such a presumption may not be relied upon is clear.

> "When it is further considered that during the period in question, when these discharges occurred, from April 1, 1937, to August 21, 1937, 74 employees were discharged or laid off by respondent, of which only 24 were members of United, *and that in each case of a discharge, the reason given for it really existed, it is clear that the finding of the Board that that reason will not be accepted as the real one but must be recognized as a pretext, is based entirely on suspicion and amounts in effect to the holding that when a United man commits a fault and is discharged, the fact of his Unionism raises a presumption that the ground assigned was a false one.* Matters of this kind may not be decided on suspicion, surmise and feeling, rather than on evidence, and findings resting on these bases may not stand." (Italics ours.) (*N.L.R.B. v. Goodyear Tire & Rubber Co.* (1942, CCA 5th), 129 Fed. (2d) 661, at p. 667.)

It is uncontradicted that all of the discharged employees in some fashion participated in the strike, and that the CIO found them guilty of undermining its policies, including the policy against wartime strikes. Under such circumstances, the Board is not justified in resting its findings on suspicion and surmise, particularly in view of the fact that many employees who participated in permissible AFL activity were not disturbed by the CIO and remained in the petitioner's employ. (R. 736-738.)

CONCLUSION.

The basic question as to whether the Board has acted in excess of its powers in prohibiting the coercion of employees by labor organizations, in regulating the internal affairs of unions and in forbidding the performance of valid "closed shop" contracts, is one which this Court has already decided adversely to our views in *Local 2880, etc. v. N.L.R.B., supra.* We trust, however, that the Court will, after considering the arguments and authorities urged in support of our position, rule in harmony with the decisions of the Seventh Circuit.

Should the Court again uphold the views of the Board on this question of law, we feel confident, nevertheless, that the Court will rule the doctrine of the *Rutland Court Owners* case, *supra,* to be inapplicable to the facts disclosed by the record.

The Board by its decision in the instant case, cuts across well-established principles of law and forces upon the Petitioner the functions of a trial judge without first having furnished it any rules or standards to guide it in the exercise thereof. The Board not only requires the Petitioner to take on the attributes of a judge, but also imposes upon it extraordinary and eccentric duties both as judge and as obligor under an admittedly valid contract.

First, it requires the Petitioner to evaluate and weigh evidence, but fails to state whether the Petitioner is authorized, as was the Board, to draw "either of two inconsistent inferences from the evidence" and

to base a finding on the one so selected, or whether it should have, as judges ordinarily do, found that since the proven facts gave equal support to inconsistent inferences, that the illegal motivation of the CIO had not been established. Under either of these rules or standards the Petitioner would have been entitled to find that the CIO was not motivated by a desire to coerce its members, but it is evident that the Board does not intend to permit the Petitioner to exercise its duties of weighing and evaluating the evidence under either of these standards, and that it is punishing the Petitioner because it drew from the proven facts a reasonable inference, inconsistent, however, with that drawn by the Board. This we submit is arbitrary and capricious and without any support whatsoever in the National Labor Relations Act.

Second, it requires the Petitioner before it performs a valid contract to probe the state of mind and the mental processes of the obligee, all contrary to the well-established principle of law that a malicious motive does not convert the exercise of a legal right into actionable conduct.

Third, it compels the Petitioner to declare a valid contract unenforceable because, as obligor it is alleged to have knowledge that the obligee intended by means of the contract to violate some law or public policy, all contrary to the well-established principle that it is no defense to the performance of a contract that the obligor knows that the agreement or its performance might aid the obligee to violate the law.

Not satisfied with burdening the Petitioner with this impossible task, the Board culminates its arbitrariness by casting upon the Petitioner the stigma of not being in good faith because it did not foresee that the Board by administrative fiat would cast upon it such extraordinary duties and would formulate such novel and eccentric rules and standards.

We submit, therefore, that the decision and order of the Board herein is arbitrary, constitutes an abuse of discretion, is in excess of its powers, and deprives the Petitioner of property without due process.

Dated, San Francisco,
April 20, 1948.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Testimony of Albert Zulaica.

"The Witness. Well, he says, 'I think that you fellows have been misled,' he says, 'because we can throw you people out of wearing those AFL buttons.' I said, 'Well, you can't do that.' I said, 'If you start doing that you will have to throw the majority out because most of them are wearing an AFL button.'

Trial Examiner Ruckel. Most of them what?

The Witness. Most of them wearing AFL buttons.

Trial Examiner Ruckel. In the plant?

The Witness. In the plant, yes. Then he says, 'We don't have to do that.' He says, 'We can pick some of you out, throw you out and claim that you were leaders, and that will scare the rest of them.' And I said, 'Well, we don't scare so very easy as all that.' I says, 'You will have to throw all of us out before we will ever stop,' I said, 'because most everyone here is fed up with the CIO.'

Then he says to me, 'Are you an enemy of the CIO?' and I said, 'No, I am not. I praise the CIO, they have a very good policy,' I said, 'but it is the officers of that local that makes it so hard for us to get along.' And then he says, 'Then you won't change your mind?' and I said, 'No, absolutely not, not until you people at the office do the right thing for us.'

* * * * * * *

Q. (By Mr. Royster) Now, did you report this conversation to anyone?

A. I couldn't report that conversation right then because there were no officials of the company present at the time. They had all gone home. But on Monday morning I reported it to Mr. Mason.

Q. And who is Mr. Mason?

A. He is the foreman of the Toilet Department.

Q. *Well, what did you tell Mr. Mason?* I don't want you to necessarily give the exact words of what you told him, but what portion of this conversation, if not all of it, did you report to Mr. Mason?

A. Well, what I really wanted to find out at the time was—like I said to Mr. Mason, that I wanted to know if those people had a right to come in the plant any time they felt like it. And I said, 'I would like to have you talk to Stanberry, or Altman, and find out what it is all about.' *That is all I said to Mason.*

Q. Well, did you have any further conversation with Mr. Mason?

A. He came to me about two or two and a half hours later, and he told me that he had spoken to Mr. Stanberry and that Stanberry said that the reason we were having so much trouble was because we were wearing AFL buttons. * * *

Q. (By Mr. Royster) Well, did you have any conversation with Mr. Stanberry?

A. Well, just a few words. I think it was in the afternoon.

Q. Of what day?

A. That same day, that Monday, August 13.

Q. All right.

A. He was coming from the Seafoam Department, and he was in kind of a hurry, and I asked him if I could have a word with him. And I will say this much for him, he always stopped to listen to anyone that wants to talk to him even if he is in a hurry. So he stopped. Then I told him, I said, 'Did Mason talk to you?' He said, 'Yes,' he says, 'and I think all your trouble is because you are wearing those buttons. If you take them off you won't have that trouble, see. You can keep that in your heart and take your buttons off. They could never take that out of your heart if you wanted to go into another union.' And he just went by." (R. 310-311-312.)

Testimony of Don E. Stanberry.

"Q. During the month of August did Mr. Zulaica come to you with a complaint about having been threatened for wearing an AFL button and electioneering for AFL?

A. Perhaps, direct; either directly or indirectly. I don't remember whether it was directly from him or through his foreman.

Q. Do you recall the nature of the complaint?

A. Well, the complaint was that Charles Leacock and other identified colored people were threatening the men at night.

Q. Was the reason for the threat given you?

A. I believe they stated it was connected with wearing AFL buttons.

Q. Did you take any action in connection with that?

A. I did not.

Q. Did you speak to Mr. Zulaica about the matter?

A. Yes, I did.

Q. By the way, what was Mr. Leacock's position?

A. Mr. Leacock was porter, and he was also a CIO steward.

Q. I take it Mr. Leacock did not hold any foreman's position, any supervisory position?

A. He held no supervisory position whatsoever.

Q. Did you hold a conversation with Mr. Zulaica with respect to his dealings with Mr. Leacock?

A. Yes, I did.

Q. And will you give us the burden of the conversation?

A. Well, it was more in the nature of a request from Zulaica for advice as to what to do in the situation, the general situation as well as this particular incident. And I went over the whole situation with him from beginning to end, and pointed out that the best legal advice we had been able to obtain substantiated the fact that our present CIO contract was valid, and that that required that anyone working for the company would have to be a member of the CIO Union, and also be in good standing. I also pointed out that what meant to be in good standing we did not know, and the union had never told us the exact reason for the previous dismissals or suspensions, I should say, other than that they were not in good standing.

Q. Did you advise him that Mr. Leacock had as much a right to express an opinion in the controversy as anybody else?

A. That is quite true.

Q. Did you advise him to avoid controversy with Mr. Leacock?

A. Well, I told him the best thing was to try to smooth it over as easily as he could." (R. 717-718.)